Office-Supreme Court, U.S.
FILED
AUG 10 1983
ALEXANDER L. STEVAS,
CLERK

83-233

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1983

COLORADO RIVER INDIAN TRIBES,
Petitioner,

vs.

GERALD ARANSON, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RUSSEL LAWRENCE BARSH
COUNSEL OF RECORD
SIDNEY C. FLORES
FLORES, ESTREMERA & BARRIOS
95 South Market Street,
Suite 250
San Jose, California 95113
Telephone: (408) 292-3400
Counsel for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

(1) Has *Montana v. United States*, 450 U.S. 544 (1981), changed this Court's rule that express reference to the median line or far shore of a navigable body of water in the instrument establishing an Indian reservation is evidence of the United States' intention to confirm or convey the bed?

(2) Does historical tribal dependence on irrigated agriculture, like historical tribal dependence on fishing, overcome the presumption against conveyance of submerged lands by the United States?

PARTIES INVOLVED

United States of America, Plaintiff-Appellee; Gerald Aranson and Jan Furst Aranson, his wife; Blythe Land Properties, a Limited Partnership; Joe B. Finley, individually and as President of Western Cattle Feeders, and Florence S. Finley, his wife; Murray M. Hausner and Leonore Hausner, his wife; Jared C. John, Jr., and Alice B. John, his wife; Edward Meltzer and Frieda A. Meltzer, his wife; Arthur Ourieff and Verni Ourieff, his wife; Jack M. Ostrow; Prima Rosa Land and Cattle Company, A Partnership; Arthur I. Berman; Martin A. Levy; Western Cattle Feeders, a California corporation; Virgil L. Jones, individually and as President of Board of Trustees of Palo Verde Irrigation District; Rancho Del Juan, Inc., an Arizona corporation; Neil John, individually and as President of Rancho Del Juan, Inc.; C. P. Richins and Sons, a Partnership; Charles P. Richins, Jr., and Agnes Richins, his wife; Norman E. Richins and Winifred Richins, his wife; Lawrence D. Richins, individually and as President of Sunrise Farms and as President of Riverview Farm and Tillage Company, and Barbara Richins, his wife; Riverview Farm and Cattle Company, a Partnership; Arnold M. Travis and Joan D. Travis, his wife; Riverview Land Company, a California corporation; C. P. Richins, individually and as President of Riverview Land Company; Sunrise Farms, a California corporation; Harry B. Swerdlow; Travis Farms, a Partnership; Joe B. Finley, Jr., and Mary C. Finley, his wife; R. W. Bilbo and Kathryn S. Bilbo, his wife; Arizona Farmers Production Credit Association; Bank of America National Trust and Savings Association; Desert Ginning Company, Inc., an Arizona corporation; Blythe Feed Yards, a Partnership; The Federal Land Bank of Berkeley; Riverview Farm and Tillage Company, a California corporation; Northwestern Mutual Life Insurance Company; Los Angeles Period Furniture Company, Inc.; Julius Fligelman, individually and as President of Los Angeles Period Furniture Company, Inc., Defendant-Appellant.

TABLE OF CONTENTS

	Page
Question presented	i
Parties involved	ii
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement of the case	2
Reasons for granting the writ	7
1. The United States confirmed or conveyed the bed of the Colorado River to petitioner by clear and express words	7
2. Petitioner has demonstrated both aboriginal and contemporary dependence on the waters of the Colorado River for agriculture and fishing	2
3. Petitioner's claims to the riverbed precede the admission of Arizona and California to the Union	17
Conclusion	20
Appendices	
A. Opinion of the Court of Appeals (March 30, 1981)	A-1
B. Opinion of the Court of Appeals (January 10, 1983)	A-25
C. Map	A-50

TABLE OF AUTHORITIES CITED

Cases

Page

Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) 5, 6, 9

Application of Barker, 559 F.2d 588 (Cust.&.Pat.App. 1977) 8

Borax Consolidated Ltd. v. City of Los Angeles, 296 U.S. 10 (1935) 17

Burns v. Alcala, 420 U.S. 575 (1975) 8

Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) ..5, 6, 7, 8

Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982) 6, 7, 8

Conway County Farmers Assoc. v. United States, 588 F.2d 592 (8th Cir. 1978) 8

Hynes v. Grimes Packing Co., 337 U.S. 86 (1949) 17

Menominee Tribe v. United States, 391 U.S. 404 (1968) 7

Montana v. United States, 450 U.S. 544 (1981) .... i, 1, 4, 5, 6, 9, 16, 17

Moore v. United States, 157 F.2d 760 (9th Cir. 1946) 9

Oneida Nation v. County of Oneida, 414 U.S. 661 (1974) 18

Shively v. Bowlby, 152 U.S. 1 (1894) 17

Shoshone Tribe v. United States, 299 U.S. 479 (1937) .. 18

United States v. Dann, 706 F.2d 919 (10th Cir. 1983) .. 18

United States v. Marubeni America Corp., 611 F.2d 763 (9th Cir. 1980) 8

United States v. Rio Grande Dam & Irrigation Co., 164 U.S. 690 (1899) 17

TABLE OF AUTHORITIES CITED

	Page
United States v. Romaine, 255 F. 253 (9th Cir. 1919)	9
United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339 (1941)	18
United States v. Washington, 694 F.2d 188 (9th Cir. 1982)	6
Washington v. Fishing Vessel Association, 443 U.S. 658 (1979)	7
Wilson v. Omaha Tribe, 442 U.S. 653 (1979)	6

Federal Statutes and Executive Orders

Act of September 9, 1850, 9 Stat. 452	17
Act of March 3, 1865, 13 Stat. 541	2, 3, 5, 7, 14, 19
Act of March 2, 1867, 14 Stat. 492	14
Act of July 27, 1868, 15 Stat. 198	14
Act of May 29, 1872, 17 Stat. 165	14
Act of June 10, 1910, 36 Stat. 557	19
Act of April 30, 1964, 78 Stat. 188	10, 19
Act of August 11, 1966, 80 Stat. 340	19
25 U.S.C. § 194	2, 6
28 U.S.C. § 1254(1)	2
Executive Order of November 16, 1874	3
Executive Order of May 15, 1876	3, 5, 7, 19
Executive Order of November 22, 1973	3

State Statutes

Page

Act of May 15, 1862, 1862 Cal.Stat. at L. ch. 452 18

1963 Cal.Stats. ch. 859 19

1963 Ariz.Sess.Laws ch. 77 19

Congressional and Executive Documents

House Executive Document No. 76, 34th Congress, 3rd Session (1857) 11

House Executive Document No. 90, 36th Congress, 1st Session (1861) 10, 11, 12, 13, 15

38 *Congressional Globe* 1320 (1865) 14

Report of the Commissioner of Indian Affairs, 1864 .....12, 13, 14

Report of the Commissioner of Indian Affairs, 1866 11

Report of the Commissioner of Indian Affairs, 1868 ..14, 18

Report of the Commissioner of Indian Affairs, 1870 15

Report of the Commissioner of Indian Affairs, 1871 15

Report of the Commissioner of Indian Affairs, 1872 14

Report of the Commissioner of Indian Affairs, 1873 14

Report of the Commissioner of Indian Affairs, 1876 14

Report of the Commissioner of Indian Affairs, 1877 14

Report of the Commissioner of Indian Affairs, 1882 14

Miscellaneous

Page

R. Barsh and J. Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After Montana v. United States*, 56 Washington Law Review 627 (1981) 17

J. Bartlett, Personal Narrative of Explorations and Incidents in Texas, New Mexico, California, Sonora, and Chihuahua (1854) 12

H. Bolton, ed., *Kino's Historical Memoir of Primeria Alta* (1936) 10

E. Castetter and W. Bell, *Yuman Indian Agriculture* (1951) 10, 11, 12, 13, 14, 15, 16

J. Galvin, ed., *A Record of Travels in Arizona and California, 1775-1776* (1965) 10

A. Kroeber, *Handbook of the Indians of California*, Bureau of American Ethnology Bulletin No. 78 (1925) 11, 15

A. Kroeber, *Preliminary Sketch of the Mohave Indians*, 4 American Anthropologist (new series) 276 (1902) 11, 15

L. Spier, *Yuman Tribes of the Gila River* (1933) 11

E. Trippell, *The Yuma Indians*, 13 Overland Monthly (2nd series) 574 (1889) 11, 15

A. Woodward, *Journal of Lt. Thomas W. Sweeny, 1849-1853* (1956) 12

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1983

COLORADO RIVER INDIAN TRIBES,
Petitioner,

vs.

GERALD ARANSON, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Colorado River Indian Tribes, the federally-recognized governing body of the confederated Mohaves and Chemehuevis of the Colorado River Indian Reservation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The original opinion of the Ninth Circuit in this case, not officially reported but attached as an appendix hereto (Appendix A), was issued on March 30, 1981. On April 17, 1981 the Ninth Circuit withdrew this opinion and invited the parties to submit supplemental briefs in light of this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981). A revised opinion was issued on January 10, 1983, and is reported at 696 F.2d 654 (Appendix B).

JURISDICTION

The Ninth Circuit denied Petitioner's petition for a rehearing *en banc* in this case on May 13, 1983. This petition for certiorari was timely filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Act of March 3, 1865, 13 Stat. 541, 559:

> All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries.

25 U.S.C. § 194:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

STATEMENT OF THE CASE

The Mohaves and Chemehuevis were aboriginal inhabitants of the lower Colorado River. They subsisted by cultivating corn, beans, melons and pumpkins, using the river's waters to saturate the desert, and by fishing. There was little hunting in the valley, and settlements clung along the river's banks.

Congress established the Colorado River Indian Reservation in 1865 by setting aside a portion of the Mohaves' aboriginal territory within what was then the Territory

of Arizona. Act of March 3, 1865, 13 Stat. 541, 559. Congress used the river as a western boundary, but did not specify whether the line was to run down the near or far shore. The reservation was expanded by an Executive Order of November 22, 1873, and extended *across* the Colorado River at its northern end by an Executive Order of November 16, 1874. The river itself continued to serve as the reservation's southwest boundary.

An Executive Order of May 15, 1876, restated and clarified the reservation's boundaries as follows:

> Beginning at a point where La Paz Arroyo enters the Colorado River and 4 miles above Ehrenberg; thence easterly with said Arroyo to a point south of the crest of La Paz Mountain; thence with said mountain crest in a northerly direction to the top of Black Mountain; thence in a northwesterly direction *over the Colorado River* to the top of Monument Peak, in the State of California; thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a direct line toward the place of beginning *to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning;* thence to the place of beginning.

The course of the river has not remained stable. After the construction of Laguna Dam in 1909, it migrated westward into California, forming a large bend (Map, Appendix C). The Palo Verde cutoff isolated this bend in 1920, returning the river to a more easterly course. These changes in the course of the reservation's boundary river raised three questions:

> (1) Did the river's westward migration (1909-1920) enlarge the Colorado River Indian Reservation at the expense of California?

(2) Did the artificial elimination of the river's bend in 1920 restore this land to California?

(3) Did the reservation include the bed of the Colorado River as well as the fast land lying east of its course?

This suit was instituted by the United States in 1972, acting as trustee for the Colorado River Indian Tribes. After a 1977 decision favorable to the Tribes, all of the defendants except the State of California appealed.[1] The Tribes themselves intervened by leave of the Ninth Circuit during the course of the appeal, followed by the State of Arizona.

At first, the Ninth Circuit affirmed. Applying the principles of accretion and avulsion, it concluded that the river's westward migration had enlarged the reservation, and that the 1920 cutoff had not diminished it. Congressional intent to include the riverbed was to be inferred from the Indians' historical dependence on agriculture for subsistence (1981 Opinion, Appendix A). After reconsideration in the light of *Montana v. United States*, however, the Ninth Circuit found *insufficient evidence* of Congressional intent to include the riverbed in the reservation. 696 F.2d at 666. It remanded for consideration of whether the Tribes had aboriginal title to the riverbed *prior* to the establishment of the reservation in 1865, such that a Congressional grant would not have been necessary.

---

[1]The State of California, originally a party to this litigation, did not join in the appeal, apparently because the United States did not press claims to the west half of the riverbed and the district court made no findings in that regard. Petitioner did not waive its claims to the west side of the riverbed, however, and intervened on appeal to prevent any inappropriate concessions by the United States.

Petitioner only seeks review on the issue of the United States' intent to confirm or convey the bed of the Colorado River to the Tribes in the Act of March 3, 1865, and the clarifying Executive Order of May 15, 1876.

Certiorari should be granted because the Ninth Circuit has cast doubt on the effect of *Montana v. United States* on this Court's earlier decisions in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), and *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), neither of which was overruled. *Choctaw Nation* held that Congress' confirmation of an Indian reservation to the median line of a navigable river implies conveyance of the riverbed to that line. *Alaska Pacific Fisheries* held that conveyance of submerged land would also be implied if the Indians were aboriginally dependent on boundary waters for their subsistence, as by fishing, and Congress intended this way of life to continue. *Montana* concluded that the Crow Tribe's claims to the bed of the Big Horn River fit neither the *Choctaw Nation* nor the *Alaska Pacific Fisheries* rules since the river was not mentioned in the treaty creating the reservation, and the Crows did not fish or otherwise depend on the river for subsistence.

In this case Congress and the President expressly extended the reservation *to the far shore* of the boundary river. Referring to *Montana*, however, the Ninth Circuit held that this was not sufficiently explicit. "The *Montana* decision foreclosures any argument that Congress intended to convey lands underlying navigable waters unless an express reference *to the bed* beneath the waters can be found in the grants establishing the reservation." 696 F.2d at 664 (emphasis supplied). This, Petitioner believes, is

much more restrictive than *Montana* contemplated, and overrules *Choctaw Nation*, where the median line *but not the bed* of the river was mentioned by Congress.

Unlike the Crows, moreover, Petitioner was aboriginally dependent on cultivating crops, watered by the Colorado River, and on fishing. The reservation was expressly set aside to preserve and, through better irrigation, improve Petitioner's agriculture. Although the Ninth Circuit conceded that *Montana* "permits a court to infer congressional intent to convey the bed beneath navigable water *if the Indians can prove they depended heavily* on the particular body of water," it held that Petitioner's econmoy was "not *so* dependent on the river that Congress would have intended" to convey the bed. 696 F.2d at 666 (emphasis supplied). This, too, is overly restrictive. A tribe subsisting almost exclusively on irrigated crops and fish is no less dependent on water than one that subsists almost entirely on fish alone.

The Ninth Circuit paradoxically continues to recognize *fishing* tribes' ownership of submerged lands, relying on the authority of *Alaska Pacific Fisheries. E.g., Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982); *United States v. Washington*, 694 F.2d 188, 189 (9th Cir. 1982). But the proper test is not fishing, *per se*, but economic dependence, past and present, on the waterway.

Besides distinguishing unjustifiably between irrigated agriculture and fishing, the Ninth Circuit misplaced the burden of proof under 25 U.S.C. § 194. As this Court explained in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 669 (1979), "[s]ection 194 contemplates the non-Indian's

shouldering the burden of persuasion as well as the burden of producing evidence once the Tribe has made out its prima facie case of prior title or possession." Furthermore, it has been the consistent practice of this Court to construe ambiguous enactments in tribes' favor, especially in disputes over land and resources. *Washington v. Fishing Vessel Association*, 443 U.S. 658, 690 (1979); *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968). On the contrary, the Ninth Circuit disregarded the *express* language of the 1865 Act and 1876 Executive Order, and abundant, *uncontradicted* evidence of Petitioner's historical dependence on the Colorado River for subsistence.

REASONS FOR GRANTING THE WRIT

1. The United States Confirmed or Conveyed the Bed of the Colorado River to Petitioner By Clear and Express Words

This Court last considered a similar set of facts in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). The Choctaws claimed half the bed of the Arkansas River under a treaty which used the river's median line as a boundary. Writing for the unanimous Court, Justice Marshall relied on the "natural inference . . . that all the land within (the treaty's) metes and bounds was conveyed, including the banks and beds of rivers." 397 U.S. at 634. This inference was irresistible where the median line of the river itself was a boundary, since Congress easily could have referred to the near shore if it had contemplated excluding the riverbed.

In *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), the applicable treaty expressly bisected Flathead Lake in describing the boundar-

ies of the Flathead Indian Reservation. The Ninth Circuit reasoned,

> Had Congress intended *not* to convey the southern half of the lake to the Indians, it could easily have defined the Reservation's northern boundary, upon reaching the west shore of the lake, as running along the shore of the southern half of Flathead Lake.

665 F.2d at 962 n. 28. Courts may not disregard the plain meaning of statutory words absent persuasive evidence, from legislative history, that some other meaning was intended. *Burns v. Alcala*, 420 U.S. 575, 580 (1975). Nor may courts treat any of the statutory words Congress uses as mere surplusage. All must be given effect. *United States v. Marubeni American Corp.*, 611 F.2d 763, 767 (9th Cir. 1980); *Conway County Farmers Assoc. v. United States*, 588 F.2d 592, 598 (8th Cir. 1978); *Application of Barker*, 559 F.2d 588, 592 (Cust. & Pat. App. 1977). If Congress runs the boundary of an Indian reservation through the middle of a river or a lake, rather than along the shore, it must be presumed to have acted with deliberation, and meant what it said.

The same reasoning applies here. If the United States had intended to exclude the Colorado River from the Colorado River Indian Reservation, it could have run the reservation's western line down the near shore of the river, rather than the far shore. Nothing would have been simpler—nor can the use of the far shore have any plausible significance except as evidence of intent to make the riverbed part of the reservation. It would be absurd for a grant running to the middle of a lake (*Namen*) or river (*Choctaw Nation*) to convey the bed, but a grant running all the way to the far shore to convey nothing.

2. Petitioner Has Demonstrated Both Aboriginal and Contemporary Dependence On the Waters of the Colorado River for Agriculture and Fishing

After concluding that the Crow treaty "did not by its terms formally convey" the bed of the Big Horn River to that tribe, *Montana* further held that "fishing was not important for their diet or way of life." 450 U.S. at 553, 556. This distinguished *Montana* from *Alaska Pacific Fisheries v. United States*, 248 U.S. 18 (1918), which held that a reservation purposely established so that a fishing tribe could continue to subsist by fishing necessarily implied the conveyance of submerged lands.

> They were largely fishermen and hunters, accustomed to live from the returns of these vocations, and looked upon the islands as a suitable location for their colony, because the fishery adjacent to the shore would afford a primary means of subsistence and a promising opportunity for industrial and commercial development.

248 U.S. at 88. Since the "Indians could not sustain themselves from the use of the upland alone [and] the use of the adjacent fishing grounds was equally essential," Congress must have intended to include boundary tidelands in the reservation. 248 U.S. at 89. Also see *United States v. Romaine*, 255 F. 253 (9th Cir. 1919); *Moore v. United States*, 157 F.2d 760, 764 (9th Cir. 1946).

The Crows failed to satisfy the *Alaska Pacific Fisheries* test because they were primarily an upland hunting people and could not show any aboriginal or contemporary dependence on the Big Horn River for subsistence. The Colorado River Tribes could not be more different. Mohaves and Chemehuevis have been farmers since remote antiquity. They used both the natural flooding of the river

and artificial irrigation to water their crops, an absolute necessity in the midst of a severe desert. Each family owned a strip of land alongside the river to take advantage of natural and artificial overflows. Fishing was their main source of animal protein. The aboriginal boundaries of Mohave territory and the subsequent location of the reservation within it were determined by this riparian economy.

According to a modern study, the Mohaves obtained about half of their aboriginal subsistences from riparian agriculture.[2] As early as 1604, Spanish explorers found the Mohaves tending "beautiful cornfields very well cultivated with abundant crops of maize, beans and pumpkins."[3] "All sorts of crops are to be found," Fray Francisco Garces reported in 1775, "and in places the cultivable lands are so extensive that they can support the inhabitants and many others besides."[4] A numerous and powerful people, the Mohaves supplied the Spanish with food and guides for the exploration and settlement of the upper Colorado.

The earliest American travellers along the lower Colorado were also impressed by the diversity of Yuman[5]

---

[2]E. Castetter and W. Bell, *Yuman Indian Agriculture* 74, 138 (1951).

[3]H. Bolton, ed., 1 *Kino's Historical Memoir of Primeria Alta* 217, 110 (1936).

[4]J. Galvin, ed., *A Record of Travels in Arizona and California, 1775-1776* 86 (1965).

[5]The Mohaves are one of several "Yuman" peoples closely related by language and history, living adjacent in the lower Colorado region and including the Gila-Maricopa and Yuma. Mohaves and Chemehuevis have been united for centuries. House Executive Document 90, 36th Congress, 1st Session (1861), at 72-73. They are identified as a confederated people in section 2(a) of the Act of April 30, 1964 (P.L. 88-302), 78 Stat. 188.

agriculture practiced, as in ancient Egypt, on riparian lands saturated by the river's spring floods. Army Major S. P. Heintzelman, writing from Fort Yuma on the California side of the river in 1853, noted that

> The river bottom is wide and fertile . . . and is intersected by a great number of sloughs and lagoons, former beds of the river. On these the Indians plant in the month of July, or so soon as the waters of the annual rise commence to subside. No vegetables will grow beyond the influence of the overflow.
>
> They cultivate water melons, musk melons, pumpkins, corn and beans. The water melons are small and indifferent, musk melons large, and the pumpkins good. These latter they cut and dry for winter use.
>
> Wheat is planted in the same manner, near the lagoons, in December or January, and ripens in May and June. It has a fine plump grain, and well-filled ears.[6]

"They subsist almost exclusively on beans and corn, with occasional watermelons and pumpkins," Lieutenant Ives wrote during an 1857-1858 military survey, "and are probably as fine a race, physically, as there is in existence."[7]

---

[6]House Executive Document 76, 34th Congress, 3rd Session (1857), at 36-37. See, similarly, *Report of the Commissioner of Indian Affairs, 1866*, at 109-110; E. Trippell, *The Yuma Indians*, 13 Overland Monthly (2nd Series) 561, 573-74 (1899); A. Kroeber, *Handbook of the Indians of California* 736, Bureau of American Ethnology Bulletin No. 78 (1925); A. Kroeber, *Preliminary Sketch of the Mohave Indians*, 4 American Anthropologist (new series) 276 (1902); L. Spier, *Yuman Tribes of the Gila River* 58-61 (1933); E. Castetter and W. Bell, *Yuman Indian Agriculture, supra*, 69-70.

[7]House Executive Document 90, 36th Congress, 1st Session (1861), at 73.

Early efforts by whites to cultivate the same lands were disastrous. Lieutenant Sweeny wrote from Camp Yuma that

> We tried very hard to raise garden vegetables here this year, and were almost certain of success in consequence of the overflow of the river and the unusual quantity of rain that had fallen, but it proved a complete failure. It is the general opinion here now that nothing can be raised in these diggings except by the Indians, or those who adopt their plan of encamping on the planting grounds and protect them from the animals and insects that swarm around the young plants, and will certainly destroy them if not driven off.[8]

Military officers and American settlers in the region generally supplied themselves with corn and melons purchased from Yuman farmers.[9] "On the lower Colorado there was liberality to a fault."[10]

There is at least some evidence of Yuman use of ditch irrigation by the 1850s. When John Russell Bartlett passed through the valley in 1853, he found the river's waters "turned off by the Indians to irrigate their lands."

> I have not cited the agriculture of these tribes as superior to that of all other Indians; although I may be safe in saying that the system is more extensively and methodically practised than elsewhere. The

---

[8]A. Woodward, ed., *Journal of Lt. Thomas W. Sweeny, 1849-1853* 175-76 (1956).

[9]*Report of the Commissioner of Indian Affairs, 1864,* at 304; House Executive Document 90, *supra,* 70, 83; E. Castetter and W. Bell, *Yuman Indian Agriculture, supra,* 71.

[10]E. Castetter and W. Bell, *Yuman Indian Agriculture, supra,* 71.

> Yumans, and other tribes on the Colorado irrigate their lands, and raise wheat, corn, melons, etc.[11]

There also appears to have been some use of natural swales, modified to capture the flood waters as the river receded in early summer, and as late as 1941 water was often hand-carried from the river to parched adjacent fields.[12]

Lieutenant Ives was the first to suggest that "a system of irrigation and an improved method of agriculture would make the valley more productive."[13] In proposing the establishment of a reservation for the Colorado River tribes, the Commissioner of Indian Affairs accordingly recommended construction of an irrigation canal to water Indian crops.[14] A.F. Waldemar, the Army engineer assigned to survey the reservation, was "surprised at the great quantity of rich bottom land and alluvial soil" in Mohave country, and concluded that

> The most humane and cheapest way to provide permanently for the Indians, and educate at least their rising generation to useful labors, would be, in my humble opinion, that the government not only give them the land between Halfway Bend and Corner Rock, but also assist them in digging an irrigation canal from the Mesa towards Halfway Bend. They would then become undependent of the uncertain rise

---

[11] J. Bartlett, *Personal Narrative of Explorations and Incidents in Texas, New Mexico, California, Sonora, and Chihuahua* 215, 262-63 (1854).

[12] E. Castetter and W. Bell, *Yuman Indian Agriculture, supra,* 132-33, 135.

[13] House Executive Document 90, 36th Congress, 1st Session (1861), at 73.

[14] *Report of the Commissioner of Indian Affairs, 1864,* at 300-1.

> and fall of the river, could raise regular crops, and would soon be able to sell a large surplus.[15]

The following year, Congress established the Colorado River Indian Reservation noting, in the course of debate, the tribes' agricultural reliance on the river's flow. Act of March 3, 1865, 13 Stat. 541, 559; 38 *Congressional Globe* 1320 (1865).

Funds for irrigation were appropriated in 1867 and construction began the next spring.[16] Geological and topographical obstacles were formidable, and in 1873 the resident Indian Agent resorted to forced Indian labor, promising to supply Mohave workers with food only—a promise later broken.[17] Between 1872 and 1882 about one acre per capita was under cultivation on the reservation, mostly in wheat, corn and beans,[18] but reliable irrigation was not available until the 1940s. By this time the construction of Laguna (1909), Boulder (1935) and Parker (1938) dams had reduced the river's annual floods considerably, causing a severe decline in Mohave acreage and yields.[19]

---

[15] *Id.* 304.

[16] Act of March 2, 1867, 14 Stat. 492, 514-15; Act of July 27, 1868, 15 Stat. 198, 222; Act of May 29, 1872, 17 Stat. 165, 188; *Report of the Commissioner of Indian Affairs, 1868*, at 137.

[17] *Report of the Commissioner of Indian Affairs, 1873*, at 285; *Report of the Commissioner of Indian Affairs, 1876*, at 5; *Report of the Commissioner of Indian Affairs, 1877*, at 1.

[18] *Report of the Commissioner of Indian Affairs, 1872*, at 58; *Report of the Commissioner of Indian Affairs, 1882*, at 3. Aboriginal cultivation has also been estimated at about 1-2 acres per household. E. Castetter and W. Bell, *Yuman Indian Agriculture, supra*, 75.

[19] E. Castetter and W. Bell, *Yuman Indian Agriculture, supra*, 76-77, 135-36.

There is no doubt that Congress established the reservation to protect and improve the tribe's agriculture, which was aboriginally dependent on flooding and limited artificial irrigation, and for the future increasingly dependent on artificial irrigation alone. Today, one-third of the reservation's 287,000 acres is under irrigated cultivation, chiefly in cotton (44 per cent), alfalfa (40 per cent), lettuce and melons. With rainfall of less than 10 inches yearly, summer temperatures commonly rising to 110-115°F, and no important mineral reserves, the reservation is habitable only through judicious, water-intensive cultivation of riparian lands.

Fishing was also an important part of the aboriginal Mohave diet. "The Mohave hunted little," observed the eminent anthropologist Kroeber. "They fished more."[20] Minnows, carp, suckers and humpback were hooked, netted, trapped or scooped by various means.[21] Kroeber explains:

> The fish of the muddy Colorado are rather soft and unpalatable to the white man, but the Mohave caught quantities and relished them. Game is very scarce in the valley, and the Mohave rarely left their country to hunt.[22]

---

[20]A. Kroeber, *Preliminary Sketch of the Mohave Indians, supra,* 276. Also see *Report of the Commissioner of Indian Affairs, 1870,* at 594; *Report of the Commissioner of Indian Affairs, 1871,* at 364; E. Castetter and W. Bell, *Yuman Indian Agriculture, supra,* 211-12, 238.

[21]E. Trippell, *The Yuma Indians, supra,* 574; E. Castetter and W. Bell, *Yuman Indian Agriculture, supra,* 219-22.

[22]A. Kroeber, *Handbook of the Indians of California, supra,* 737; E. Castetter and W. Bell, *Yuman Indian Agriculture, supra,* 218; House Executive Document 90, 36th Congress, 1st Session (1861), at 73.

Yumans served fish to the first Spanish explorers of the river in 1700.[23] Hydroelectric development and growing diversions of Colorado River water for irrigation upstream have reduced many fish stocks and, consequently, reduced Yuman reliance on this source of protein.

The Ninth Circuit's failure to acknowledge these historical facts in its January 10, 1983 opinion is confusing, since it relied on them previously. In its March 30, 1981 opinion (Appendix A), it found that

> Examination of the history and lifestyle of the Mohave Indians, the principal tribe on the reservation, suggests that the government intended to convey the riverbed as part of the reservation. At the time the reservation was created, Congress was aware that the Mohaves were heavily dependent upon the Colorado River; having been cut off from traditional hunting grounds, the Indians risked frequent famine without the ability to divert the river and alter its course for irrigation purposes.

It is difficult to understand why the Ninth Circuit reversed itself on this point. *Montana* did not alter the course of history, or make the Mohaves any less reliant, aboriginally, on the Colorado River than they were before. No new facts were introduced by Respondents after the Circuit's 1981 decision, nor did the Circuit invite rebriefing of the matter. Indeed, when Petitioner moved the Circuit to take judicial notice of additional documentation of Mohave fishing on November 19, 1981, the panel declined to rule on the motion.

---

[23] E. Castetter and W. Bell, *Yuman Indian Agriculture*, *supra*, 220.

3. Petitioner's Claims to the Riverbed Precede the Admission of Arizona and California to the Union

The pivotal legal issue in *Montana* was an aspect of the Equal Footing doctrine: a presumption that public lands beneath navigable waters vest in new states at the time they are admitted to the Union.[24] Congress nonetheless has power to dispose of submerged lands prior to statehood to fulfill treaties and other national obligations, *Shively v. Bowlby*, 152 U.S. 1 (1894), and to retain these lands after statehood for national purposes, *United States v. Rio Grande Dam & Irrigation Co.*, 164 U.S. 690 (1899), including the protection of Indian waters and fisheries, *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949). It simply must be relatively explicit about its intentions and purpose. Once a state has been admitted, further Congresional dispositions of submerged lands are ordinarily without effect. *Borax Consolidated Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935). California became a state in 1850. Act of September 9, 1850, 9 Stat. 452.

Montana was based on the parties' representations that the Crows' rights arose from a pre-statehood *grant*. The appropriate question, then, was whether the grant was sufficiently explicit respecting the bed of the Big Horn River, and this Court concluded that it was not. On the contrary, Petitioner here bases its claims on aboriginal possession and ownership, which Congress *would have had to extinguish, explicitly*, before any part of it could vest in a new

---

[24]See, generally, R. Barsh and J. Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After Montana v. United States*, 56 Washington Law Review, 627, 654-661 (1981).

state. *United States v. Dann*, 706 F.2d 919 (10th Cir. 1983); *Oneida Nation v. County of Oneida*, 414 U.S. 661 (1974); *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339 (1941). Aboriginal ownership includes all natural resources which the Indian inhabitants customarily used. *Santa Fe Pacific R.R. Co., supra; Shoshone Trive v. United States*, 299 U.S. 479 (1937).

Respondents must therefore identify an express Congressional extinguishment of Petitioner's claims before Petitioner need demonstrate an express Congressional grant prior to statehood. It is already a matter of public record that the Colorado River Indian Reservation is a part of the aboriginal territory of the Mohaves, and that the Reservation's location was chosen with this fact in mind.[25]

Even if California acquired some interest in the bed of the Colorado River within Petitioner's reservations in 1850, its claims were relinquished by the Act of May 15, 1862, 1862 Cal.Stat. at L. ch. 452:

> Section 1. All lands belonging to this State, and situated within any Indian Reservation belonging to the United States in this State, are hereby granted to the United States for the use of said reservation . . . .
>
> Section 2. This act shall take effect from and after its passage.

California must base any contemporary claims on federal legislation expressly severing the riverbed from Petitioner's reservation after 1865.

---

[25] *Report of the Commisioner of Indian Affairs, 1868*, at 137.

There is one additional consideration rendering the early date of California statehood immaterial: the boundary between California and Arizona was not settled until 1966. Act of August 11, 1966 (P.L. 89-531), 80 Stat. 340. In the meantime, Congress had explicitly confirmed Petitioner's title to the reservation described by the May 15, 1876 Executive Order—that is, bounded on the west by the far shore of the Colorado River. Act of April 30, 1964 (P.L. 88-302), 78 Stat. 188. State legislation ratifying the new Arizona-California boundary did not disturb, but expressly preserved preexisting rights and titles. 1963 Cal.Stats. ch. 859, § 4; 1963 Ariz. Sess.Laws ch. 77, § 5.

In any event, California's 1850 admission to the Union only affects the west half of the riverbed. The east half remained within the Territory of Arizona until 1910, long after the 1865 act establishing the Colorado River Indian Reservation and the 1876 Executive Order clarifying its boundaries. Act of June 10, 1910, 36 Stat. 557.

CONCLUSION

For the foregoing reasons, Petitioner suggests that a writ of certiorari should be issued to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

Russel Lawrence Barsh
Sidney C. Flores
Flores, Estremera & Barrios
95 South Market Street,
Suite 250
San Jose, California 95113
Telephone: (408) 292-3400
Counsel for Petitioner

(Appendices follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

United States v. Aranson, et al.

No. 77-2295 (9th Cir., March 30, 1981)

Abridged Text

Before TRASK and SNEED, Circuit Judges, and EAST, District Judge sitting by designation

SNEED, Circuit Judge

The proper resolution of this appeal has proved as difficult to divine as determining the course of the Colorado River in the Palo Verde Valley during the period of time with which this case is concerned. Both have proved elusive, and, even now, some doubt with respect to both remains. The appeal is from the decision of the district court adjudging certain lands in what is referred to as the Olive Lake region of the Palo Verde Valley to be the property of the United States, acting as trustee for the Colorado River Indians, and ordering appellants to pay damages because of their wrongful occupation of those lands. Appellants maintain that the district court should have granted their motion for a new trial because of a change in the applicable law. Appellants also contend that the district court erred in concluding that the Colorado River Indian Reservation included the easterly half of the bed of the Colorado River. We affirm.

I

In 1865, Congress created the Colorado River Indian Reservation by setting apart certain lands within what was

then the Territory of Arizona. Act of Mar. 3, 1865, ch. 127, 13 Stat. 541, 559. The boundaries of the reservation were modified or redefined by executive orders issued on November 22, 1873; November 16, 1874; May 15, 1876; and November 22, 1915. *See Executive Orders Relating to Indian Reservations, 1855-1922*, pt. I, at 6, 7; pt. II, at 5, 6 (1975).

The reservation extended westward to, and in some places beyond, the Colorado River, which formed the boundary between California and Arizona. The river, however, did not maintain a constant course. Over the years it carved out various channels through the Palo Verde Valley. Three of those channels are critical to this case. For our purposes, the 1908 channel refers to the course followed by the river before the completion in 1909 of the Laguna Dam, which is located downstream from the Palo Verde Valley. It appears in Appendix A to this opinion. In the decade following completion of the dam, the river moved gradually westward, as soil was eroded from the California bank and deposited on the Arizona side. By 1915 its location was as depicted by Appendix B, and by 1919 the course of the river had formed a bend or loop known as the "Olive Lake Bend" which Appendices C and D reflect. We shall refer to the river's course at this time as the 1919 channel. In 1920, the Palo Verde Mutual Water Company, with the authorization of the United States Department of the Interior, constructed a cut-off channel across the neck of this bend. Appendix E shows the location of the cut-off as proposed. By 1921, the entire river had moved into this cut-off channel, described as the Olive Lake Cut, and was following a course to the east of both the 1908 channel and the westerly, 1919 channel. We shall refer to this last course as the 1921 channel. The record contains no drawing of the 1921 channel although Appendix F fixes the channel as of April

1925 somewhat east of the present course of the river. Obviously the 1921 channel was also east of the present river.[1]

Uncertainty over the shifting state border led California and Arizona to fix the line in a Boundary Pact which was approved by Congress in 1966. Act of Aug. 11, 1966, Pub. L.No.89-531, 80 Stat. 340. The Pact did not affect property claims or titles, and the states' ratifying statutes provided that titles, rights, or claims would not be prejudiced by the Pact's designation of the state boundary line. 1963 Ariz. Sess.Laws ch. 77, § 5, reprinted in annotation to Ariz.Rev. Stat. Ann. § 41-522 (West 1974); 1963 Cal. Stats. ch. 859, § 4, reprinted in annotation to Cal.Gov't Code § 175 (West 1980).

On July 17, 1972, the United States in its capacity as trustee for the Indians commenced this action seeking to quiet title to those lands situated on the California side of the present channel and east of the median line of the 1919 channel. Various individuals and corporations, as well as the Palo Verde Irrigation District and the state of California, were named as defendants. The private defendants had acquired lands in the Olive Lake region, apparently from previous occupants, some years after the construction of the Olive Lake Cut but before the adoption of the Arizona-California Boundary Pact. The Palo Verde Irrigation District, a public district of the state of California claims lands in the Olive Lake region and regulates water usage in the vicinity. The Indians contended, however, that the Colorado River Indian Reservation extended to the median line of the 1919 channel and that, because the Olive Lake

---

[1]The course of the river now appears to be somewhat to the west of the Olive Lake Cut. In resolving the issues of this case, however, we need not consider changes occurring after 1921.

Cut had effected an avulsive change in the course of the river, their title to this land was never lost. They therefore asked that the defendants be required to remove themselves and their personal belongings from the land and to pay damages for wrongful possession.

At trial, the dispute focused on the issue of whether the change in the river's course from the 1919 channel to the 1921 channel was the result of avulsion or accretion. The district court found that the change had been avulsive and concluded that title to the lands had remained in the Indians. The district court also found that the reservation included the eastern half of the bed. Thus, the court held that the Indians presently hold title to the lands each of the median line of the 1919 channel, and that the state of California owns the bed west of that median line. The court also ordered the defendants, except the state of California, to pay damages for wrongful possession.

Although the district court announced its decision on November 17, 1976, the court's findings of fact, conclusions of law, and judgment were not filed until February 11, 1977. In the intervening period, the Supreme Court rendered its decision in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977), in which the court overruled its previous decision in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed.2d 526 (1973). Arguing that the district court had relied on federal law and that under *Corvallis* the case should be resolved under state rather than federal law, the defendants, except the state of California, moved for a new trial. The motion was denied, and defendants, again save for the state of California, appealed.

Appellants raise two issues. They contend that the property dispute is governed by California law, not federal law. Under California law, in appellants' view, the Indians would not have obtained title to any accretions which were artificially caused. Hence, appellants request a new trial in order to prove that the lands in question were deposited on the Arizona side of the river as a result of artificial accretions caused by the construction of the Laguna Dam in 1909. Appellants also contend that the Indian reservation did not include the eastern half of the riverbed and that the district court's determination of the reservation's western boundary was thus incorrect. We shall address these issues separately.

II

In *Bonelli Cattle Co. v. Arizona, supra,* the Supreme Court held that a dispute between a private claimant and the state of Arizona over title to land within the abandoned bed of the Colorado River was governed by federal law. Consistent with *Bonelli,* the district court decided this case on the basis of federal law. The overruling of *Bonelli* by *Corvallis* enables the appellants to argue that this case must be decided according to state, not federal law, and that the district court should thus have granted their motion for a new trial. The appellee contends that *Corvallis* is inapplicable here because, unlike the Willamette River, which was the source of the controversy in *Corvallis,* the Colorado River until 1966 formed the boundary between two states.

We believe this dispute concerning the proper application of *Corvallis* was resolved by the Supreme Court's recent decision in *Wilson v. Omaha Indian Tribe,* 442 U.S. 653, 99 S.Ct. 2529, 61 L.Ed.2d 153 (1979). The claimant in *Wilson*

was a tribe of Indians whose reservation, located in Nebraska, was bounded on the east by the Missouri River. Prior to a compact made in 1943, the river had also marked the state boundary between Nebraska and Iowa. The tribe claimed lands that had once been part of the reservation but which, due to changes in the river's course, had passed to the Iowa side of the river. The Supreme Court held that the Indians' claim was governed by federal law but that state law should be adopted as the rule of decision. *Id.* at 669-76, 99 S.Ct. at 2539-42. This holding governs this case. It follows that the substantive rule of decision in this case with respect to issues arising from changes in the course of the Colorado River must be ascertained by incorporating state law to give content to the federal law which controls this controversy.[2] This conclusion, however,

---

[2]Our conclusion that this controversy should be decided in accordance with state law is not inconsistent with our recent decision in *United States v. Montana*, 604 F.2d 1162, 1173-74 (9th Cir. 1979), *cert. granted*, 445 U.S. 960, 100 S.Ct. 1645, 64 L.Ed.2d 234 (1980), in which we reaffirmed our earlier ruling in *United States v. Finch*, 548 F.2d 822 (9th Cir. 1976), *vacated on other grounds*, 433 U.S. 676, 97 S.Ct. 2909, 53 L.Ed.2d 1048 (1977), and declined to apply Montana law in determining the title of the Crow Tribe in the bed and banks of the Big Horn River. In *Finch* and *Montana*, the question was whether the treaties creating the Crow Reservation had conferred title to the riverbed on the Indians, thus precluding Montana from acquiring title to the bed upon its admission to the Union. The case did not raise any issue involving subsequent changes in title or deviations in the river's course. Hence, our inquiry began and ended with the construction of the Crow Indian Treaties as applied to a river within the Crow Reservation. This was purely a matter of federal law. In this case, similarly, we must apply federal law to decide whether the statute and executive orders which established the reservation conveyed to the Indians the title to the riverbed. In determining the effect of subsequent changes in the river's course, however, *Wilson* requires that state law serve as the rule of decision. *Cf. Corvallis, supra*, 429 U.S. at 371, 377, 97 S.Ct. 582, 590, 5 L.Ed.2d 550.

does not require reversal of the judgment of the district court if its application leads to no different result. A proper judgment, though based on the wrong grounds, should nonetheless be affirmed. *United States v. Best*, 573 F.2d 1095, 1100-01 (9th Cir. 1978).

(The court compares the federal common law of accretion, on which the district court's opinion is based, to the California law of accretion, the law that should have been applied pursuant to the holding of *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), to determine whether the difference in the laws requires a new trial. The federal law regarding land formed by accretion, "the gradual deposition of soil upon the shore of an upland bounded by water," is that it belongs to the upland owner. Sudden avulsive changes in the course of a river, however, "do not alter the boundaries, which remain in the abandoned riverbed." The district court held that the pre-1920 shifts of the river westward were gradual, therefore the land that was added to the western boundary of the reservation accrued to the Indians according to the common law rule of accretion. The post-1919 Olive Lake Cut, however, effected a sudden avulsive change in the course of the river eastward leaving the reservation's boundaries unaltered. Consequently the district court held that the present boundary was in the abandoned 1919 channel.

The court of appeals finds that the California courts generally agree with the common law doctrine of accretion. Appellants urge that an exception of the California common law rule be applied in this case. Several California cases establish a "last natural channel" rule, which would leave property boundaries unchanged where accretions were artificially caused. Appellants contend that the pre-

1920 westward movement of the river was caused by the Laguna Dam, which was constructed in 1909. They argue that the boundary, following the "last natural channel" rule, would be the 1908 channel of the Colorado River.

The court finds that the "last natural channel" rule does not apply to the facts of this case. California's artificial accretion doctrine is a narrow exception intended to protect state sovereign lands and that the cases are largely limited to tidelands. The court notes that the artificial accretion exception seems to be based "first, on the state's control over obstructions erected in waterways and, second, on the statutory or constitutional inalienability of particular state lands," and that it has never been used to directly benefit a private landowner. The court therefore holds that the exception does not apply in the instant case.

The court also rejects appellants' argument that the reasoning in *People ex rel. Department of Public Works v. Shasta Pipe & Supply Co.*, 264 Cal.App.2d 520 (1968) be applied to the facts of this case. In *Shasta Pipe* a littoral landowner north of the Feather River claimed lands between the old and new channel when the river's course moved southward due to mining and dredging operations, basing his claim in part on the doctrine of accretion. The court in *Shasta Pipe* rejected the accretion claim, holding that title to the abandoned northern channel remained in the state because the change in the river's course was artificially caused. Applying that reasoning to the instant case, appellants argued that, since the westward shift of the Colorado River was artificially caused by construction of the Laguna Dam in 1909, title to the abandoned 1908 channel is in the state of California. The court finds, however, that California has not claimed the 1908 riverbed but only

the westerly half of the 1919 channel. Since California has not appealed from the district court's judgment that it owns half of the 1919 channel, it is res judicata as it affects the state.)

We conclude that appellants cannot invoke California's artificial accretion exception. It follows that the California rule of decision would thus be identical to the federal law doctrine applied by the district court. Therefore, the change in applicable law effected by the Supreme Court's decisions in Corvallis and Wilson would not alter the outcome in this case. The district court properly denied appellants' motion for a new trial.

III

Trask, Circuit Judge (with whom East, District Judge, concurs)

Appellants challenge the district court's determination that the executive orders which established the reservation conveyed to the Indians title to the easterly half of the bed of the median line of the abandoned westerly channel. Here, as in Choctaw Nation v. Oklahoma, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970), "the question is whether the United States intended to convey title to the riverbed to [the Indians]." Id. at 633, 90 S.Ct. at 1335.[7] In ascertaining

---

[7]The dissent emphasizes language in *Choctaw Nation* that discusses the degree to which an Indian tribe is displaced, or the degree to which the granting language speaks of establishing a "permanent home" for the tribe, in deciding whether a riverbed was conveyed as part of the tribe's reservation. This inquiry was not utilized as a touchstone for decision in *Choctaw Nation*, however, but rather as a non-exclusive factor properly considered in determining governmental intent. Thus, the extent to which an Indian tribe was displaced, or the degree to which a treaty speaks

such intent, this court must resolve all ambiguities in the orders in favor of the Indians. See, e.g., Squire v. Capoe-

---

of establishing a permanent location for a reservation, has no direct bearing *per se* on whether the government intended to convey the riverbed in any particular case. For example, because the history of the treaty involved in *Choctaw Nation* indicated that the Indians were granted "complete soverignty" over their new lands, the Court concluded that all lands within the metes and bounds of the reservation, including the riverbed, were conveyed, so that the Indians might maintain dominion and control over their new home. 397 U.S. at 634-35, 90 S.Ct. at 1336. The Court noted that

> [a]s a practical matter, reservation of the river bed [from the granted land] would have meant that petitioners were not entitled to enter upon and take sand and gravel or other minerals from the shallow parts of the river or islands formed when the water was low. In many respects however, the Indians were promised virtually complete sovereignty over their new lands. . . . We do not believe that petitioners would have considered that they could have been precluded from exercising these basic ownership rights to the river bed, and we think it very unlikely that the United States intended otherwise.

397 U.S. at 635, 90 S.Ct. at 1336 (citations omitted). Thus, the Court looked to the history of the dealings between the Indians and the government and to the permanency expressed in the granting instrument, not as touchstones for decision (as implied by the dissent's analysis), but as indicia of intent.

Similarly, this court's decision in *United States v. Finch*, 548 F.2d 822 (9th Cir. 1976), *vacated on other grounds*, 433 U.S. 676, 97 S.Ct. 2909, 53 L.Ed.2d 1048 (1977), relied upon the fact that the reservation was expressly established as a "permanent home." The court, however, was again concerned with the permanency of the reservation only as evidence of the government's intent. *See* 548 F.2d at 832. As in *Choctaw Nation*, the permanency of the language of conveyance in *Finch* was merely a source from which, in the absence of anything more probative, the government's intent to convey disputed property could be inferred. We need not conclude that such intent was absent in the present case merely because it was neither manifested by language of "permanency" nor inferable from prior government dealings with the tribe. We look instead to other sources to find indications of the government's intent.

man, 351 U.S. 1, 6-7, 76 S.Ct. 611, 614-615, 100 L.Ed. 883 (1956) (quoting Carpenter v. Shaw, 280 U.S. 363, 367, 50 S.Ct. 121, 122, 74 L.Ed. 478 (1930); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582, 8 L.Ed. 483 (1832); Navajo Tribal Utility Authority v. Arizona Dept. of Revenue, 608 F.2d 1228, 1233 (9th Cir. 1979). As the Supreme Court has stated:

> The construction [of laws governing the Indians], instead of being strict, is liberal; doubful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years.

Choate v. Trapp, 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912), *quoted with approval in Antoine v. Washington*, 420 U.S. 194, 212, 95 S.Ct. 944, 954, 43 L.Ed.2d 129 (1975) (Douglas, J., concurring). *See also Haley v. Seaton*, 281 F.2d 620, 623 (D.C.Cir. 1960); 1 American Indian Policy Review Comm'n, Final Report 109-11 (1977). Applying this rule of construction to the executive orders establishing and defining the reservation, especially the order of May 15, 1876, we conclude that the federal government intended to convey the eastern half of the Colorado River bed to the Indians as part of the reservation.

The first executive order delineating the bounds of the reservation, that of 1873, appears ambiguous. It established the western boundary of the reservation only vaguely—"bounded on the west by the Colorado River."[5] Resolution

---

[5]The order of 1874 clarified these boundaries somewhat by setting forth specific mountain peaks to be used as monuments.

of this ambiguity, if indeed there is one,[9] in favor of the Indians results in their receiving title to the eastern half of the riverbed by virtue of this order alone. *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 80-83, 86-87, 43 S.Ct. 60, 61-62, 63-64, 67 L.Ed. 140 (1922). Nevertheless, the order of May 15, 1876, also indicates the government's intent to convey the eastern half of the riverbed. In establishing the metes and bounds of the entire reservation, this order set as part of the western boundary "a direct line toward the place of beginning to the *west* bank of the Colorado River; thence down said *west* bank to a point opposite the place of beginning; thence to the place of beginning." (Emphasis added.) Although the government did not own the western half of the riverbed at the time the reservation was created (that half having already passed to California under the equal-footing doctrine), it is surely a fair inference that in the uncertain legal-boundary atmosphere of the time the government believed that establishing the boundary at the west bank would operate to convey that portion of the bed to which it still had title.[10]

---

[9]Similarly vague language has been held clearly to convey a riverbed as part of the reservation being established. *See Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 81-83, 43 S.Ct. 60, 61-62, 67 L.Ed. 140 (1922) (reservation held to include half of riverbed where boundary was "the main channel of the Arkansas River").

[10]The dissent argues that to draw such an inference is "to find sophisticated conveyancing where only the equivalent of a surveyor's imprecise calls" is in evidence, and that the intent of this order was only to fix in a general way the western boundary of the reservation, we do not find it inconsequential, however, that the boundary was fixed by reference to the west bank instead of the east bank. Even if the intent of the order was as the dissent describes it, this does not explain why the boundary was set by the west

That the government intended to convey the riverbed is further supported by the circumstance of the Indians' dependence on the river. In determining whether the government intended that the bed of a body of water be contained within an Indian reservation, courts have frequently examined the history and lifestyle of the reservation tribes. For example, in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918), the Supreme Court concluded that an Indian reservation established as "the body of lands known as Annette Islands" included the adjacent waters and submerged lands as well as the upland islands. *Id.* at 89, 39 S.Ct. at 41. The Court based this conclusion upon its determination that the Indians of the reservation could not have sustained themselves on the upland alone. *Id.* In *Skokomish Indian Tribe v. France*, 320 F.2d 205 (9th Cir. 1963), *cert. denied*, 376 U.S. 943, 84 S.Ct. 797, 11 L.Ed.2d 767 (1964), this court affirmed findings of the district court which examined the Indian's lifestyle and concluded that the tidelands adjacent to the reservation were not intended as part of the reservation. *Id.* at 210. Because the Indian lifestyle was oriented toward river fishing, the ocean waters were not a necessary food source. *Id.* at 210-12. *See also United States v. Holt State Bank*, 270 U.S. 49, 58-59, 46 S.Ct. 197, 200, 70 L.Ed. 465 (1926); *United States v. Finch*, 548 F.2d 822, 832 (9th Cir. 1976), *vacated on other grounds*, 433 U.S. 676, 97 S.Ct. 2909, 53

---

bank; additional surveying complexities would have been avoided by adopting either as the boundary, and, absent an intent to convey the riverbed, the logical boundary choice would have been the nearer east bank. Additionally, the dissent ignores that the standard of review in this case requires us to resolve ambiguities in the language of the order in favor of the Indians.

L.Ed.2d 1048 (1977); *Moore v. United States*, 157 F.2d 760, 762-64 (9th Cir. 1946), *cert. denied*, 330 U.S. 827, 67 S.Ct. 867, 91 L.Ed. 1277 (1947). In *United States v. Finch*, *supra*, this court noted that "[those cases in which] an examination of the lifestyles of the Indian tribes was considered particularly important, involved controversies over the location of the exterior boundaries of the lands set aside for the Indians." 548 F.2d at 832 n.19. This is precisely the situation in the case at hand. Examination of the history and lifestyle of the Mohave Indians, the principal tribe on the reservation, suggests that the government intended to convey the riverbed as part of the reservation. At the time the reservation was created, Congress was aware that the Mohaves were heavily dependent upon the Colorado River; having been restricted to their reservation and cut off from traditional hunting grounds, the Indians risked frequent famine without the ability to divert the river and alter its course for irrigation purposes. *See* 5 House Ex.Doc. No. 1, 38th Cong., 2d Sess. 300-301 (1865); Senate Misc.Doc. No. 79, 37th Cong., 2d Sess. 12-14 (1862). *See also Cong. Globe*, 38th Cong. 2d Sess. 1320-22 (1865) (remarks of Arizona Territorial Representative Poston). More telling, however, is a Memorial of the Legislature of Arizona House Misc. Doc. No. 16, 38th Cong. 2d Sess. (1965) (resolution passed by Arizona Territorial Legislature), which was presented to Congress, *see Cong. Globe, supra*, at 1320, and which states in part: "[T]he late superintendent of Indian affairs of the Territory, honorable Charles D. Poston, in view of [the Colorado River Indian Tribes'] scattered and destitute condition, selected and caused to be laid off, *on the east bank and bottom of the Colorado river* a reservation. . . ."

(Emphasis added.) This language clearly suggests that the Territorial Legislature understood the reservation to include the riverbed.[11] Construing these documents in favor of the Indians, we find it probable that those involved with the establishment of the Colorado River Indian Reservation understood it to include the riverbed.

Finally, support for our conclusion that Congress intended to convey the riverbed is suggested by language in *Choctaw Nation, supra:* "[T]he United States seems to have had no present interest in retaining title to the riverbed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce." 397 U.S. at 635, 90 S.Ct. at 1336. Similarly, in this case, a holding that the United States did not intend to convey the riverbed to itself in trust for the reservation would mean that, at the time the reservation was formed, California owned the land on one side of the river, and the west half of the riverbed, the reservation owned the land on the other side of the river, and the government owned the narrow strip of riverbed between the two. Such ownership would have served no governmental interest existing at the time of the conveyance.

We do not view *United States v. Holt State Bank,* 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926), as controlling

---

[11]The dissent suggests that this language is ambiguous, in that "bottom" may refer only to the lowlands that lie alongside the river, and not to the land underneath the river itself. Such lowlands, however, fall within the description "east bank." Thus, if "bottom" is to have any independent meaning, it must refer to the submerged bed of the river. Again, even if an ambiguity were present, the standard of review requires its resolution in favor of the Indians.

authority[12] in this case, as urged by appellants and argued by the dissent. In *Holt State Bank*, as in this case, the Indians' title was merely aboriginal, not in fee simple as the title was in *Choctaw Nation*. In *Holt State Bank*, however, the Court refused to find government intent to convey to the Indians the bed of an interior lake primarily because there was never a treaty, executive order, or any other document establishing the Indian reservation from which such intent could have been inferred. 270 U.S. at 58-59, 46 S.Ct. at 200. The reservation was merely that which was left over after the government, by treaty and other action, appropriated the surrounding lands. Consequently, the only possible basis for Indian ownership of the reservation was aboriginal title. *Id.* In *Choctaw Nation*, on the other hand, the Indians were moved from their aboriginal lands to a new location, where the treaty conveyed the land to them in fee simple. 397 U.S. at 622-26, 90 S.Ct. at 1330-32. In a concurring opinion, Justice Douglas contrasts this basis of

---

[12]*Holt State Bank* has not been overruled. It is, however, an aberrational case, and we believe that it was not only distinguished, but also limited by the Supreme Court's decision in *Choctaw Nation, supra, Holt State Bank* relies excessively upon the presumption against conveyances created in reliance on the equal footing doctrine by *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894). *See* 270 U.S. at 54-55, 46 S.Ct. at 198-199. This presumption had not yet been judicially articulated at the time the conveyance presently concerning us occurred, was not found significant by the Court in *Choctaw Nation*, *see* 397 U.S. at 634, 90 S.Ct. at 634, 90 S.Ct. at 1336, and very possibly is not properly applicable in a case such as this one, where the land in question was conveyed by the government to itself in trust for an Indian tribe (a fact notably absent in *Holt State Bank*). See generally Note, *Indian Rights to Lands Underlying Navigable Waters: State Jurisdiction Under the Equal Footing Doctrine v. Tribal Sovereignty*, 55 N.Dak.L.Rev. 453, 462, 466-67, 469-74 (1979).

ownership with that of the tribes in *Holt State Bank*, in order to distinguish *Choctaw Nation* from the former decision. 397 U.S. at 638-39, 90 S.Ct. at 1338 (Douglas, J., concurring).

The present case can likewise be distinguished from *Holt State Bank*. The Indian tribes of the Colorado River Indian Reservation (predominantly the Mohaves) had been citizens of Mexico, from which nation the United States obtained the lands in question. As prior Mexican citizens, the Indians were deemed not to have any aboriginal title; thus, no treaties ceding such title to the government would have been recognized. *See Cong. Globe*, 38th Cong., 2d Sess. 1320 (1865). The bases for Indian title to the reservation are the executive orders establishing the reservation in trust for the tribes and the more recent Act of Congress fixing beneficial ownership of the reservation in the tribes, *see* Act of April 30, 1964, Pub.L.No. 88-302, 78 Stat. 188. In this case, therefore, unlike *Holt State Bank*, there exist affirmative governmental acts from which intention to grant the bed of the Colorado River can reasonably be inferred.

IV

Although it is true that conveyances by the United States during a state's territorial period are not lightly to be inferred, *United States v. Holt State Bank*, 270 U.S. 49, 55, 46 S.Ct. 197, 199, 70 L.Ed. 465 (1926), it is nevertheless within the power of the United States to make such conveyances if it so desires, *Shively v. Bowlby*, 152 U.S. 1, 48, 14 S.Ct. 548, 566, 38 L.Ed. 331 (1894). We find the evidence in this case sufficient to enable us to conclude that the government intended to convey the eastern half of the riverbed to the Indians when it formed the reservation. Ac-

cordingly, we hold that the boundary of the reservation extends to the midpoint of the 1919 abandoned westerly channel of the Colorado River, and that the eastern half of the riverbed was conveyed by the government to the Indians as part of the reservation.

The judgment of the district court is affirmed.

SNEED, Circuit Judge, dissenting from Parts III and IV of the court's opinion:

I respectfully dissent from Parts III and IV of this opinion and would hold that the pertinent statute and executive orders did not convey to the Indians title to the easterly half of the bed of the Colorado River.

A. Intent of the 1876 Executive Order

My starting point is that a grant establishing an Indian reservation does not always impart title to the bed of boundary rivers or even to bodies of water that are wholly within the reservation. *United States v. Holt State Bank*, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926). To determine the scope of the grant one should determine whether Congress and the President, in establishing the reservation, manifested a definite intention to convey title to the riverbed.

The requirement of a definite intention to transfer title to the bed derives from long-established principles of law with respect to navigable waters in territories of the United States. Early in our history, the Supreme Court declared that the United States holds such waters in trust for the future states and that under the "equal footing" doctrine a state acquired title to the beds of such waters upon entering the Union. *Pollard's Lessee v. Hagan*, 44 U.S.

(3 How.) 212, 221-22, 11 L.Ed. 565 (1845). Although Congress may make grants of the lands underlying navigable waters in the territories, it has generally not done so:

> The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that . . . the navigable waters and the soils under them . . . shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states. . . .

Shivley v. Bowlby, 152 U.S. 1, 49-50, 14 S. Ct. 548, 566, 38 L.Ed. 331 (1894).

In *Holt Bank, supra*, the Supreme Court applied these principles to the Chippewa Indians' claim to the bed of a drained lake. From its earlier decisions, the Court declared "[i]t follows . . . that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." 270 U.S. at 55, 46 S. Ct. at 199. The Court observed that the treaty between the United States and the Chippewas reserved lands in a general way for occupation by the Indians but did not affirmatively define the rights of the Indians in reservation lands or exclude others from the use of navigable waters within the reservation.

A different result was reached in *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 90 S.Ct.. 1328, 25 L.Ed.2d 615 (1970). There the Supreme Court held that the Choctaw and Cherokee Nations had acquired sections of the riverbed of the Arkansas River in the State of Oklahoma under treaties made between those Indian tribes and the United States. The opinion of the Court and the concurring

opinion of Justice Douglas dwelt at some length on the history of relations between those tribes and the federal government, noting that the Indians had been forced, in consequence of repeated violations of promises made by the government, to leave their homelands in the southeastern part of the United States and move first to lands in the Arkansas Territory and then to lands west of the Arkansas Territory, presently located in Oklahoma. *Id.* at 622-28, 90 S.Ct. at 1330-33 (majority opinion); 637-38 nn. 2, 3, 90 S.Ct. 1337-38 nn. 2, 3 (Douglas, J., concurring). The Court also emphasized that the treaties creating the reservation gave the Indians fee simple title to the lands and promised that "'no part of the land granted to them shall ever be embraced in any Territory or State.'" *Id.* at 634-35, 90 S.Ct. at ..... The Indians agreed to move to this reservation in return for "'a *permanent* home . . . which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever.'" *Id.* at 624, 90 S.Ct. at 1336 (emphasis in original). From the language of the treaties as well as from the historical circumstances under which the Indians entered into the treaties, the Court inferred a congressional intention to convey to the Indians title to the bed of the Arkansas River, which was within the boundaries of the reservation.

The present case seems to me to be more similar to *Holt Bank* than to *Choctaw Nation*. The record reveals no history of broken promises or oppression by the government against the Colorado River Indians. The Indians have not been forced to settle hundreds of miles from their aboriginal homelands. More importantly, the act of Congress which created the reservation used none of the language which the Court found determinative in *Choctaw Nation*.

The act did not give the Indians fee simple title to reservation lands, nor did it promise that the reservation would be a "permanent home" or would be independent of any territory or state. The act gave the Indians the same unspecified rights of occupation which the Court in *Holt Bank* found insufficient to convey title to the lake bed. *Holt Bank, supra,* 270 U.S. at 58, 46 S.Ct. at 200; *see also Choctaw Nation, supra,* 397 U.S. at 638-39, 90 S.Ct. at 1338 (Douglas, J., concurring).

Thus, I would hold that the establishment of the Colorado Indian Reservation did not give title to the easterly half of the riverbed. That title was held by the United States until Arizona became a state, at which time Arizona acquired title to the easterly half of the bed under the "equal footing" doctrine.

The majority in support of its holding that title to the easterly half of the riverbed passed to the Indians relies on the language of the 1876 Executive Order which fixed the boundary of the reservation on the west bank of the river. I cannot accord that language the weight given it by the majority because it could not have been intended to convey legal title to the *entire* bed of the river inasmuch as California already owned its westerly half. It escapes me why the Order should be understood to convey that half which the United States ordinarily would hold in trust for a future state. How, it must be asked, could the future state of Arizona come into the Union on an "equal footing" with California if the title to the easterly half of the river were to be given to the Indians in 1876? What the majority overlooks is the reasonable probability that the Executive Order merely fixed the western boundary of the reservation. To construe it as a conveyance of title to the

easterly half of the bed, but not to the westerly half, is to find sophisticated conveyancing where only the equivalent of a surveyor's imprecise calls with respect to the western boundary exist.

Reliance by the majority on the lifestyle of the Indians establishes at best only a reason for fixing the westerly boundary of the reservation so as to include the river. Access to fishing, which was needed, was thus assured. The Executive Order could not, to repeat, have been intended to convey title to one part of the stream bed. Why should it have intended to convey title to the other part in derogation of the responsibility of the United States to the future state of Arizona?

The Memorial of the Arizona Territorial Legislature to which the majority refers to support its position does not, as the majority suggests, "unequivocally" do so. To establish a reservation "on the east bank and bottom of the Colorado River" reasonably could be understood to refer to lands lying alongside the east bank of the river. A not unusual meaning of the word "bottom" when used as a noun is to designate the relatively level and sometimes grassy land lying adjacent to a river. This appears to me a much more probable meaning of the word as used in the Memorial than the assumption of the majority that it refers to the bed of the Colorado River.

The majority, of course, relies upon the canon that requires all ambiguities with respect to the intent of the United States to be resolved in favor of the Indians. Inasmuch as the United States brought this suit on behalf of the Indians its use here may be questioned. As trustee of the Indians the United States must infuse its own action

as the supreme sovereign, burdened with fiduciary duties owing to future states, with ambiguity in order to discharge properly its fiduciary duty to the Indians. That its duty to the Indians is superior to all others within the context of this case is beyond dispute; however, it does not flow automatically from this proposition that the courts should permit an ambiguity always to be resolved in favor of the Indians. A more nearly neutral approach to intent under such circumstances as are presented by this case strikes me as preferable.

Another difficulty with the canon's use is that it almost invariably means less than it appears to. Inasmuch as an ambiguity in the statute and executive orders clearly exists here, its use might be expected to be enough without more to decide the case. That this is not so is revealed by the supporting reasons the majority marshalls. However, how much less it means is never made clear. At its weakest it is but a makeweight. In the present case it should function no more strongly.

B. Location of Easterly Half of Riverbed

I acknowledge that a holding that title to the bed of the Colorado River did not pass to the Indians when the Colorado River Indian Reservation was established would present a difficult problem. It would require the fixing of the location of the easterly half of the riverbed of the Colorado River prior to the construction of the cut-off channel by the Palo Verde Mutual Water Company. This problem could not be solved by adopting the median line of the 1919 channel as the district court did. Adoption of this line rested on the district court's holding that the eastern half of the riverbed belonged to the Indians, a position I reject.

Nor can it be solved by the district court's finding of fact number 11 which reads:

> 11. Immediately prior to said avulsive change, the course and bed of the Colorado River was the westernmost of the two channels shown on the Engle maps, Exhibits 25 and 27 [Appendices C and D], which position of the river is supported by the Yost sketch map, Exhibit 28, labeled "Colorado River 1920."

This finding does not fix the *eastern* limit of the riverbed of the Colorado River. It is to that point, and not beyond, that I would hold the Indians own.

The appellants argue that the eastern limit of the riverbed is fixed by the easternmost channel of the Colorado River as reflected in Appendices C and D. This may not be so. Appendices C and D indicate that an island or sand bar existed between the two channels prior to the construction of the cut-off. Under California law, which appears to be applicable, an island which forms in the bed of a navigable stream belongs to the state. Cal.Civ.Code § 1016 (West 1954). However, an island which is created when a river divides to form two channels belongs to the original owner. *Id.* § 1018. Thus, an island, if such there was immediately prior to the cut-off's construction, may have been part of the reservation and thus continues to belong to the Indians.

The present record simply does not permit fixing with any certainty the location of the eastern half of the riverbed. Therefore, I would remand to the district court for further proceedings.

Appendix B

In the United States Court of Appeals
for the Ninth Circuit

CA No. 77-2295

DC No. CR 72-1621

United States of America,
Plaintiff-Appellee,

v.

Gerald Aranson, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Central District of California

Manuel L. Real, District Judge, Presiding
On Petition to Rehear

Argued and submitted January 15, 1982

Before: TRASK and SNEED, Circuit Judges, and EAST,* District Judge

OPINION

SNEED, Circuit Judge:

[Filed Jan. 10, 1983]

The proper resolution of this appeal has proved as difficult to divine as determining the course of the Colorado River in the Palo Verde Valley during the period of time

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

with which this case is concerned. Both have proved elusive, and, even now, some doubt with respect to both remains. The appeal is from the decision of the district court adjudging certain lands in what is referred to as the Olive Lake region of the Palo Verde Valley to be the property of the United States, acting as trustee for the Colorado River Indians, and ordering appellants to pay damages because of their wrongful occupation of those lands. Appellants maintain that the district court should have granted their motion for a new trial because of a change in the applicable law. Appellants also contend that the district court erred in concluding that the Colorado River Indian Reservation included the easterly half of the bed of the Colorado River. Affirmed in part and reversed and remanded in part.

I

In 1865, Congress created the Colorado River Indian Reservation by setting apart certain lands within what was then the Territory of Arizona. Act of Mar. 3, 1865, ch. 127, 13 Stat. 541, 559. The boundaries of the Reservation were modified or redefined by executive orders issued on November 22, 1873; November 16, 1874; May 15, 1876; and November 22, 1915. *See Executive Orders Relating to Indian Reservations, 1855–1922*, pt. I, at 6, 7; pt. II, at 5, 6 (1975).

The Reservation extended westward to, and in some places beyond, the Colorado River, which formed the boundary between California and Arizona. The river, however, did not maintain a constant course. Over the years it carved out various channels through the Palo Verde Valley. Three of those channels are critical to this case. For our purposes, the 1908 channel refers to the course followed by the river before the completion in 1909 of the Laguna Dam, which

is located downstream from the Palo Verde Valley. It appears in Appendix A to this opinion. In the decade following completion of the dam, the river moved gradually westward, as soil was eroded from the California bank and deposited on the Arizona side. By 1915 its location was as depicted by Appendix B, and by 1919 the course of the river had formed a bend or loop known as the "Oliver Lake Bend" which Appendices C and D reflect. We shall refer to the river's course at this time as the 1919 channel. In 1920, the Palo Verde Mutual Water Company, with the authorization of the United States Department of the Interior, constructed a cut-off channel across the neck of this bend. Appendix E shows the location of the cut-off as proposed. By 1921, the entire river had moved into this cut-off channel, described as the Olive Lake Cut, and was following a course to the east of both the 1908 channel and the westerly, 1919 channel. We shall refer to this last course as the 1921 channel. The record contains no drawing of the 1921 channel although Appendix F fixes the channel as of April 1925 somewhat east of the present course of the river. Obviously the 1921 channel was also east of the present river.[1]

Uncertainty over the shifting state border led California and Arizona to fix the line in a Boundary Pact which was approved by Congress in 1966. Act of Aug. 11, 1966, Pub. L. No. 89-531, 80 Stat. 340. The Pact did not affect property claims or titles, and the states' ratifying statutes provided that titles, rights, or claims would not be prejudiced by the Pact's designation of the state boundary line. 1963 Ariz. Sess. Laws ch. 77, § 5, reprinted in annotation to Ariz. Rev.

---

[1]The course of the river now appears to be somewhat to the west of the Olive Lake Cut. In resolving the issues of this case, however, we need not consider changes occurring after 1921.

Stat. Ann. § 41-522 (West 1974); 1963 Cal. Stats. ch. 859, § 4, reprinted in annotation to Cal. Gov't Code § 175 (West 1980).

On July 17, 1972, the United States in its capacity as trustee for the Indians commenced this action seeking to quiet title to those lands situated on the California side of the present channel and east of the median line of the 1919 channel. Various individuals and corporations, as well as the Palo Verde Irrigation District and the State of California, were named as defendants. The private defendants had acquired lands in the Olive Lake region, apparently from previous occupants, some years after the construction of the Olive Lake Cut but before the adoption of the Arizona-California Boundary Pact. The Palo Verde Irrigation District, a public district of the State of California, claims lands in the Olive Lake region and regulates water usage in the vicinity. The Indians contended, however, that the Colorado River Indian Reservation extended to the median line of the 1919 channel and that, because the Olive Lake Cut had effected an avulsive change in the course of the river, their title to this land was never lost. They therefore asked that the defendants be required to remove themselves and their personal belongings from the land and to pay damages for wrongful possession.

At trial, the dispute focused on the issue of whether the change in the river's course from the 1919 channel to the 1921 channel was the result of avulsion or accretion. The district court found that the change had been avulsive and concluded that title to the lands had remained in the Indians. The district court also found that the Reservation included the eastern half of the bed of the river. Thus, the

court held that the Indians presently hold title to the lands east of the median line of the 1919 channel, and that the State of California owns the bed west of that median line. The court also ordered the defendants, except the State of California, to pay damages for wrongful possession.

Although the district court announced its decision on November 17, 1976, the court's findings of fact, conclusions of law, and judgment were not filed until February 11, 1977. In the intervening period, the Supreme Court rendered its decision in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), in which the Court overruled its previous decision in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973). Arguing that the district court had relied on federal law and that under *Corvallis* the case should be resolved under state rather than federal law, the defendants, except the State of California, moved for a new trial. The motion was denied, and defendants, again save for the State of California, appealed.

Appellants raise two issues. They contend that the property dispute is governed by California law, not federal law. Under California law, in appellants' view, the Indians would not have obtained title to any accretions which were artificially caused. Hence, appellants request a new trial in order to prove that the lands in question were deposited on the Arizona side of the river as a result of artificial accretions caused by the construction of the Laguna Dam in 1909. Appellants also contend that the Indian Reservation did not include the eastern half of the riverbed and that the district court's determination of the Reservation's western boundary was thus incorrect. We shall address these issues separately.

II.

In *Bonelli Cattle Co. v. Arizona, supra,* the Supreme Court held that a dispute between a private claimant and the State of Arizona over title to land within the abandoned bed of the Colorado River was governed by federal law. Consistent with *Bonelli*, the district court decided this case on the basis of federal law. The overruling of *Bonelli* by *Corvallis* enables the appellants to argue that his case must be decided according to state, not federal law, and that the district court should thus have granted their motion for a new trial. The appellee contends that *Corvallis* is inapplicable here because, unlike the Willamette River, which was the source of the controversy in *Corvallis*, the Colorado River until 1966 formed the boundary between two states.

We believe this dispute concerning the proper application of *Corvallis* was resolved by the Supreme Court's recent decision in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979). The claimant in *Wilson* was a tribe of Indians whose reservation, located in Nebraska, was bounded on the east by the Missouri River. Prior to a compact made in 1943, the river had also marked the state boundary between Nebraska and Iowa. The tribe claimed lands that had once been part of the reservation but which, due to changes in the river's course, had passed to the Iowa side of the river. The Supreme Court held that the Indians' claim was governed by federal law but that state law should be adopted as the rule of decision. *Id.* at 669-76. This holding governs this case. It follows that the substantive rule of decision in this case with respect to issues arising from changes in the course of the Colorado River must be ascertained by

incorporating state law to give content to the federal law which controls this controversy.[2] This conclusion, however, does not require reversal of the judgment of the district court if its application leads to no different result. A proper judgment, based on the wrong grounds, should nonetheless be affirmed. *United States v. Best*, 573 F.2d 1095, 1100-01 (9th Cir. 1978).

To ascertain whether state law would alter the result reached below we must determine which state's law should provide the rule of decision. The appellants assert that California law governs, while the appellee maintains that, assuming state law is to be employed, it must be that of Arizona. We agree with the appellants. The land in dispute

---

[2]Our conclusion that this controversy should be decided in accordance with state law is not inconsistent with our recent decision in United States v. Montana, 604 F.2d 1162, 1173-74 (9th Cir. 1979), *cert. granted*, 445 U.S. 960 (1980), in which we reaffirmed our earlier ruling in United States v. Finch, 548 F.2d 822 (9th Cir. 1976), *vacated on other grounds*, 433 U.S. 676 (1977), and declined to apply Montana law in determining the title of the Crow Tribe to the bed and banks of the Big Horn River. In *Finch* and *Montana*, the question was whether the treaties creating the Crow Reservation had conferred title to the riverbed on the Indians, thus precluding Montana from acquiring title to the bed upon its admission to the Union. The case did not raise any issue involving subsequent changes in title or deviations in the river's course. Hence, our inquiry began and ended with the construction of the Crow Indian Treaties as applied to a river within the Crow Reservation. This was purely a matter of federal law. In this case, similarly, we must apply federal law to decide whether the statute and executive orders which established the Reservation conveyed to the Indians the title to the riverbed. In determining the effect of subsequent changes in the river's course, however, *Wilson* requires that state law serve as the rule of decision. *Cf. Corvallis, supra*, 429 U.S. at 371, 377.

presently is within the State of California. That is controlling unless the Arizona-California Boundary Pact dictates a different conclusion. The Pact itself dictates no choice as to what law shall govern disputes over land titles. However, in ratifying the Pact, each state adopted a "preservation of rights" provision, whcih declared:

> Nothing contained in the provisions of this act . . . shall prejudice the titles, rights or claims of any person, public or private, natural or artificial, to any of the lands herein involved whether such titles, rights, or claims arise or exist upon the basis that the lands affected by the designation of boundary as set forth in the compact and in this act were previously a part of the State of Arizona and have now become a part of the State of California, or were previously a part of the State of California and have now become a part of the State of Arizona or otherwise; . . .

1963 Ariz. Sess. Laws ch. 77, § 5, reprinted in annotation to Ariz. Rev. Stat. Ann. § 41-522 (West 1974); 1963 Cal. Stats. ch. 859, § 4, reprinted in annotation to Cal. Gov't Code § 175 (West 1980). This provision, as we read it, alters the normal assumption that property located in California is subject to California law only if the lands in dispute were part of Arizona before the adoption of the Pact and if the Indians' claims would be prejudiced by the application of California law. Neither condition exists, however.

The record, as demonstrated by Appendix F, supports appellants' contention that these lands were part of California, not Arizona, before the adoption of the Pact. Appellants, who claim title under the laws of California, have been in possession of the land since well before the Pact; indeed, their possession of the lands is not only conceded

but is the basis of the claim for damages against them. In addition, one of the appellants, the Palo Verde Irrigation District, is a public district organized under the laws of California. The District, which was created by statute in 1923, Cal. Water Code App. § 33-2 (West 1968), has authority over water usage in the Palo Verde Valley; the District is empowered to levy taxes for this purpose, *id.* § 33-28, and holds liens for unpaid taxes and water tolls on the lands in issue, *id.* § 33-28f. *See* Clerk's Record, vol. I., at 26. In view of these facts, it is clear that the area was within the jurisdiction of California prior to adoption of the Boundary Pact.[3]

Moreover, the claim of the Indians is not prejudiced by application of California law. Although Arizona case law relevant to this issue is scant, the leading case, *State v. Bonelli Cattle Co.*, 107 Ariz. 465, 469 (1972), *rev'd on other grounds*, 414 U.S. 313 (1973), cites the California law on artificial accretion with approval. Because our resolution of the relevant issue employs the same law, it is unlikely that application of Arizona law would alter our result. Thus, our choice of law does not prejudice the Indians.

Having concluded that the law of California should be adopted as the federal rule of decision in this case, we now

---

[3]In arguing that these lands were part of Arizona, the Indians may be suggesting that before the Pact, Arizona was rightfully entitled to these lands even though California in fact exercised jurisdiction over them. We do not believe, however, that the Boundary Pact or the ratifying statutes require us to determine whether Arizona could rightfully have claimed sovereignty over these lands, since the Pact was adopted precisely for the purpose of foreclosing such controversies. *Cf.* Nebraska v. Iowa, 406 U.S. 117, 112-23 (1972). The Indians are not entitled to make for Arizona a claim which Arizona has relinquished.

must decide whether a new trial is necessary. Our approach is first to review the content of the applicable federal common law, then to examine California law to determine whether it differs and, if so, whether that difference requires a new trial.

In examining California law, we shall be mindful that California courts are required by statute to follow common law rules unless those rules conflict with state law or the federal constitution. Cal. Civ. Code § 22.2 (West 1954).

Under the federal and common law rule, land formed by a process of accretion, or gradual deposition of soil upon the shore of an upland bounded by water, belongs to the upland owner. Hence, if a river forming the boundary between the property of two upland owners changes its course by a gradual process of erosion from one bank and accretion to the other, the boundary moves with the river. However, sudden or "avulsive" changes in a river's course do not alter the boundaries, which remain in the abandoned riverbed. *See County of St. Clair v. Lovingston*, 90 U.S. (23 Wall.) 46 (1874); 5A *Thompson on Real Property* §§ 2560, 2561 (repl. 1978).

The district court in this case applied federal law and concluded that as the Colorado River moved slowly westward between 1909 and 1920, the western boundary of the Reservation moved with it. However, the Olive Lake Cut, which diverted the river eastward to its 1921 channel, effected an avulsive change and thus left the Reservation's boundary unaltered. The boundary thus remained at the abandoned westerly channel. Appellants do not deny that the district court's judgment is correct as a matter of

federal law. As indicated above, the common law does not differ.

California courts have expressed approval of the common law doctrine of accretion. *See, e.g., Forgeus v. County of Santa Cruz*, 24 Cal.App. 193, 199-200 (1914). However, certain California cases have created a limited exception to the common law rules by distinguishing between accretion which is naturally caused and accretion which results from artificial causes, such as man-made dams or other structures which may obstruct the natural movements of a body of water. It is this exception to which appellants pin their hopes. They maintain that these cases establish a "last natural channel" rule under which artificially caused accretion leaves property boundaries unchanged. A new trial is necessary, they assert, to enable them to prove that the river's westward movement before 1920 was artificially caused by the construction of the Laguna Dam in 1909. From this it would follow, the appellants continue, that the western boundary of the Reservation should thus be determined not by the river's westerly, 1919 channel, as the district court held, but rather by the 1908 channel which the river followed before the closure of the dam.

We do not believe that California courts would apply the "last natural channel" rule to the facts of this case. The State of California so asserts in an *amicus curiae* brief which points out that California's exception for artificial accretions applies only to state sovereign lands. Our review of the California decisions from which the artificial accretion exception is derived convinces us that the State of California's position is correct. California courts have con-

sistently viewed the exception as a doctrine designed to protect state sovereign lands. Thus, in *Carpenter v. City of Santa Monica*, 63 Cal.App.2d 772, 787 (1944), the court stated:

> There are no doubt many federal cases, following the leading case of County of St. Clair v. Lovingston, 23 Wall. (90 U.S.) 46 [23 L.Ed. 59], relied upon by appellant, which hold that as between competing upland owners, or as between upland owners and others not claiming tidelands as successors of the state, artificial accretions belong to the upland owner. This is the general common law rule and probably the rule in this state. (*Forgeus v. County of Santa Cruz*, 24 Cal.App. 193 [140 P. 1092].) An entirely different rule may apply, however, where the upland owner attempts to assert title to lands formed by artificial accretions against the claim of the state, or its successor in interest, that such lands are tidelands . . . .
>
> When the California cases are considered there can be no reasonable doubt but that the rule in this state is that in a controversy between the state, or its grantees, and the upland owner, artificial accretions belong to the state . . . .

Later, in *People v. Hecker*, 179 Cal.App.2d 823, 837 (1960), the court declared:

> Relying upon the federal and common-law rule that accretion accrues to the upland owner even though assisted by artificial means, appellant submits that under section 22.2, Civil Code, it shall be the rule of decision in California courts. The law of this state does not support such a position. ***The within controversy is between the littoral owner and the state, and as such the rule urged by appellant does not apply.***

(Emphasis added.) These pronouncements indicate that the artificial accretion doctrine is a narrow exception intended only to protect the state's title to its sovereign lands.[4]

This interpretation is consistent with the reasons which underlie the artificial accretion exception. Although the purposes of the exception are admittedly obscure, two reasons for distinguishing between natural and artificial accretion are discernible. The first is reflected by the earliest case to distinguish between artificial and natural accretion, *Dana v. Jackson Street Wharf Co.*, 31 Cal. 118 (1866), which emphasized that since upland owners have no right to create obstructions to the natural flow of waterways, such obstructions therefore are within the control of the state. "By the common law any erection below high water mark without license, is regarded as an encroachment and intrusion on the King's soil, which the King may demolish, seize or arrent at his pleasure." Id at 120. The court then appears to have reasoned that since an artificial obstruction in the body of water is in a sense within the state's control, the state may also claim any accretion caused by such an obstruction. Thus, in *Forgeus v. County of Santa Cruz, supra*, 24 Cal.App. at 200, after upholding the claim of an upland owner to accretions

---

[4]It is true that in *City of Long Beach v. Mansell*, 3 Cal.3d 462, 469 n.4 (1970), the California Supreme Court referred to the artificial accretion exception without stating that the exception applied only to state sovereign lands. This statement occurred in a footnote as part of a two sentence summary of the rules governing accretion and avulsion. The footnote was only peripherally related to the issues in the case. Nothing in the footnote suggested, and we think it unlikely, that the court intended by this cursory description of the law to alter the rules governing accretion as more fully explained in earlier decisions.

allegedly caused by the construction on the owner's land of a country roadway, the court added: "Clearly, there is a distinction between this case and that where a structure is erected, by the state or municipality, on land below the line of ordinary high water. In the latter case the deposit of alluvion caused by such structure would not inure to the benefit of the riparian owner."

A more important reason for the artificial accretion exception was also suggested in *Dana*. The court, observing that the boundaries of the San Francisco waterfront upon which the plaintiff property was situated were statutorily definied, concluded that to permit a landowner to acquire artificial accretions would alter waterfront boundaries in contravention of that statute. *Dana, supra*, 31 Cal. at 121. Similarly, cases which have denied the claims of upland owners to land formed by artificially caused deposits upon a seashore appear to be based on a provision of the California Constitution which forbids alienation of tidelands located within two miles of an incorporated city or town. Cal. Const. art. 15, § 3 (repealed 1976; current version at art. 10, § 3). Thus, in *Patton v. City of Los Angeles*, 169 Cal. 521, 525 (1915), the California Superior Court declared that tideland which had been filled in by accretion

> was once tideland, and . . . this being so, it was reserved from sale, and was not alienable by any state officer under any law, . . . and, therefore, no artificial embankment, made by third persons, or made or suffered by state officers or agents, nor any accretion to the adjacent upland caused thereby, could operate to divest the state of its title to the tide land so reserved.

The court did not explain why its reasoning would not be equally applicable to instances of natural accretion. Pos-

sibly it is because artificial accretion more resembles the intentional alienation of state lands, which the California Constitution forbids, than does the process of natural accretion. In any event, nearly all the artificial accretion cases involved tidelands.

Hence, we conclude that California's artificial accretion exception appears to be based, first, on the state's control over obstructions erected in waterways and, second, on the statutory or constitutional inalienability of particular state lands, especially tidelands. It was created to protect the sovereign lands of the state. This purpose indicates that the exception need not be extended to private landowners. Support for this view is provided by the fact that the exception has never been applied directly to benefit a landowner other than the state or its assignee.

The case most helpful to appellants is *People ex. rel. Department of Public Works v. Shasta Pipe & Supply Co.*, 264 Cal.App.2d 520 (1968). The controversy in that case was caused by the movement of the Feather River, which in the disputed area ran from east to west. Because of mining and dredging operations, the river's course had moved southward in the century before 1960, and when the state acted in 1961 to condemn lands in the area, the owner of the land to the north of the original channel claimed title to the lands lying between the old and new channels under the doctrines of accretion, adverse possession, and occupancy. After this claim was rejected in the superior court, the court of appeals remanded for trial on the issues of adverse possession and occupancy but apparently agreed that the landowner could not claim the lands in question on the basis of accretion. Though the opinion discusses the accretion doctrine only briefly, the court

seems to have reasoned that because the change in the river's course was caused by human interference, the state had retained title to the original bed rather than acquiring title to the new bed. *Id.* at 535. The property of the upland owner on the north, therefore, could not be extended southward by accretion because it was blocked on the south by a strip of land, the river's abandoned bed, which belonged to the state. As a consequence, perhaps the owner of land lying south of the original bed was an incidental beneficiary of the artificial accretion doctrine. By preserving the state's title to the abandoned bed, owners south of the original bed may have had their property preserved against an accretion loss.

Using this reasoning, appellants argue that if the westward movement of the Colorado River prior to construction of the Olive Lake Cut was caused by the erection of the Laguna Dam in 1909, then California retained title to the 1908 channel with the result that the Reservation could not expand westward. The difficulty that the appellants encounter is that California has not claimed title to the 1908 bed. Rather, it has claimed the westerly half of the abandoned course followed by the river before the Olive Lake Cut was made in 1920. Moreover, this claim has been approved by the district court.[5] California has not ap-

---

[5]There has been some uncertainty over which bed was awarded to the State of California in the proceedings below. At oral argument, counsel for the United States, representing the Indians, admitted that he did not know which bed the state had received in the judgment. In a Supplemental Memorandum, appellants declare that the State of California was awarded the bed west of "the midstream of the Colorado River *prior to its avulsive change. . . .*" (emphasis added), thus referring to the 1919 channel; later in the same memorandum, however, appellants suggest that California

pealed from the district court's judgment; it is *res judicata* and unreviewable by us. *International Manufacturing Co. v. Landon, Inc.*, 327 F.2d 824 (9th Cir. 1964). Hence, appellants cannot assert that their property boundaries were fixed by a protective barrier of state land.[6]

---

owns the western half of the 1908 riverbed. Because of this confusion, we quote finding 14 and 15 from the district court's findings of fact:

> 14. With respect to the lands shown on said Exhibit 9, as lying between the Colorado River as shown on Exhibit 9 and the median line as shown and described on Exhibit 9 [the median line of the westerly, 1919 bed is indicated on Exhibit 9], said lands, comprising about 1912 acres, are owned by the United States of America in trust for the benefit of the Colorado River Tribes. No part of said lands have ever been disposed of by the United States of America by patent or otherwise.
>
> 15. All that part of the abandoned bed of the Colorado River lying westerly of the median line described on Exhibit 9, as of the time the river commenced flowing through the cut-off constructed by the Palo Verde Mutual Water Co. is owned by the State of California.

[6]Although we need not determine whether, but for the judgment below, and assuming that the river's westward movement was artificially-caused, California would rightfully be entitled to the 1908 bed rather than to the westerly bed, we do note that appellants' position on this issue is open to dispute. In the first place, it is not clear whether this issue, which would involve a determination of the boundary betwen California and Arizona during the period in question, would be governed by state or federal law. Under federal law, as we have observed, appellants' contention that the westward movement of the river was artificially-caused would be irrelevant. But even under state law, the issue is uncertain. To be sure, the court in *Shasta* indicated that the state retained title to the original riverbed and did not own the new bed after the Feather River changed its course as a result of artificial causes. In that case, however, the court noted that "the state does not claim the bed of the river in its present location." *Shasta, supra*, 264 Cal.App.2d at 535, 70 Cal.App.2d 618. If, on the other hand, the state were to relinquish its claim to the old bed and assert ownership over the newly

We conclude that appellants cannot invoke California's artificial accretion exception. It follows that the California rule of decision would thus be identical to the federal law doctrine applied by the district court. Therefore, the change in applicable law effected by the Supreme Court's decisions in *Corvallis* and *Wilson* would not alter the outcome in this case.

III.

TRASK, Circuit Judge:

Appellants challenge the district court's determination that the executive orders which established the Reservation conveyed to the Indians title to the easterly half of the bed of the Colorado River, and, therefore, title to lands east of the median line of the abandoned westerly channel. Here, as in *Choctaw National v. Oklahoma*, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970), "the question is whether the United States intended to convey title to the riverbed to [the Indians]." *Id.* at 633, 90 S.Ct. at 1335. Although an opinion was filed in this case on March 30, 1981, the panel withdrew its disposition in April, 1981, for reconsideration in view of *Montana v. United States*, 450 U.S. 544 (1980).

In *Montana v. United States*, the Supreme Court reaffirmed the presumption against conveyances by the United States of lands beneath navigable waters during a state's territorial period: "As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when they enter the

---

formed bed, thus declining to invoke the artificial accretion exception, as the state did in this case, it is not clear that a court applying California law would be required to reach the same result arrived at in *Shasta*.

Union and assume sovereignty on an 'equal footing' with the established States." *Id.* at 551. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 222-23, 229 (1845). In deciding a question of title to land beneath navigable waters the Court stated:

> But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, *United States v. Oregon, supra*, at 14, it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." *United States v. Holt State Bank*, 270 U.S., at 55. See also *Shively v. Bowlby, supra*, at 48. A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, *United States v. Oregon, supra*, at 14, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," *United States v. Holt State Bank, supra*, at 55, or as rendered "in clear and especial words," *Martin v. Waddell, supra*, at 411, or "unless the claim confirmed in terms embraces the land under the waters of the stream," *Packer v. Bird, supra*, at 672.

450 U.S. at 551. The Court, however, has recognized that Congress may convey lands underlying navigable waters and defeat the equal footing doctrine if the conveyances were necessary to satisfy international obligations, to promote or facilitate commerce among the States or with foreign nations, or to carry out other appropriate public purposes. *United States v. Holt State Bank*, 270 U.S. 49, 54-55 (1925); *Shively v. Bowlby*, 152 U.S. 1, 48 (1894).

The *Montana* decision forecloses any argument that Congress intended to convey lands underlying navigable waters unless an express reference to the bed beneath the waters

can be found in the grants establishing the reservation. *See* 450 U.S., at 542. For example, an implied conveyance cannot be upheld on the grounds that the navigable water lay wholly within the boundaries of a reservation, *id.* at 552; *see United States v. Holt State Bank*, 270 U.S. at 57-58, or that treaties creating the reservation contain a right of exclusive tribal occupancy. *Montana v. United States*, 450 U.S. at 554-55.

Turning to the facts in the present case, even the strongest language in the various official documents defining the reservation's western boundary falls short of the specificity required by *Montana*. We conceded in our earlier opinion (subsequently withdrawn by the panel for reconsideration in light of *Montana*) that the first executive order issued in 1873 delineating the bounds of the Reservation was ambiguous. It established the western boundary of the Reservation only vaguely as "bounded on the west by the Colorado River." We nevertheless construed the ambiguity in favor of the Tribes—an approach *Montana* rejects.[8] We next

---

[8]Although the inexact and ambiguous language in the conveyances to the Choctaw and Cherokee Tribes weighed in favor of the Indians in *Choctaw Nation*, similarly vague language in the Crow treaties was deemed insufficient in *Montana*. As Justice Stevens indicates in his concurring opinion in *Montana*, the Court's reliance in *Choctaw Nation* on the rule of construction favoring the tribes arguably could be read as an indication that the equal footing presumption against disposition by the United States of land under navigable waters did not apply to Indian reservations. *Montana v. United States*, 450 U.S. at 567-68. This was precisely the conclusion we reached in our first disposition of this case. Although Justice Stevens joins the *Montana* majority in holding that *United States v. Holt State Bank* states the rule with *Choctaw Nation* as the exception, it is noteworthy that his concurrence recognizes that the exact opposite conclusion was not unreasonable. The debate

examined Order of May 15, 1876, which established the metes and bounds of the Reservation. This order set as part of the western boundary "a direct line toward the place of beginning to the *west* bank of the Colorado River; thence *down said west bank* to a point opposite the place of beginning." (emphasis added). Although the United States did not own the western half of the riverbed in 1876 because it had passed by that time to California under the equal footing doctrine, we found that "it is surely a fair inference that in the uncertain legal-boundary atmosphere of the time the government believed that establishing the boundary at the west bank would operate to convey that portion of the bed to which it still had title." Again, this analysis does not survive *Montana's* requirement that Congress' intent be expressed in " 'clear and especial words' or 'definitely declared or otherwise made very plain,' . . . . " 450 U.S. at 554.

In our discussion of the history and lifestyle of the Tribes, we referred to a Memorial of the Legislature of Arizona, House Misc. Doc. No. 16, 38th Cong., 2d Sess. (1865); Cong. Globe, 38th Cong., 2d Sess. 1320 (a resolution passed by the Arizona Territorial Legislature which was later presented to Congress). The resolution states in part: "[T]he late superintendent of Indian affairs of the Territory, honorable Charles D. Poston, in view of the [Tribes'] scattered and destitute condition, selected and caused to be laid off, *on the east bank and bottom of the colorado river* a reservation . . . ." (emphasis added). Although we interpreted this language to show that the Territorial Legislature under-

---

concerning the logic of the *Montana* decision undoubtedly will continue for some time. Nevertheless, the Supreme Court has spoken. *See* Barsh and Henderson, *Contrary Jurisprudence; Tribal Interests in Navigable Waterways Before and After* Montana v. United States, 56 Wash. L. Rev. 627 (1981).

stood the Reservation to include the riverbed, other references in the report made by Charles Poston suggest that the word "bottom" may simply refer to the lowlands that lie alongside the river rather than the riverbed itself. For example, in his statement before Congress, Representative Poston explained that the Tribes "cultivate the bottom lands of the Colorado River where an overflow affords sufficient moisture; the failure of an overflow, which sometimes happens, is considered a great calamity, and breeds a famine." *Id.* Another report of the Tribes' agriculture describes a "fine wide bottom, in which last year, were the cultivated fields of the Indians." House Ex. Doc. 76, 34th Cong., 3d Sess. 34, 37 (1857) (letter of Capt. S. P. Heintzelman); Cong. Globe, *supra*, at 1320. This reference to growing crops in the river bottom suggests that the riverbed itself is not what the term "bottom" described.

Reaching the conclusion that the documents establishing the reservation did not convey the riverbed does not end our analysis under *Montana*. The establishment of an Indian reservation can be an "appropriate public purpose" justifying congressional conveyance of a riverbed if sufficient "public exigency" existed to prompt Congress to depart from the equal footing doctrine. 450 U.S. at 556; *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1919); *Skokomish Indian Tribe v. France*, 320 F.2d 205, 212 (9th Cir. 1963).

Significantly, the Court in *Montana* did not overrule its earlier decision in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), in which the Court construed that an Indian reservation established as "the body of lands known as the Annette Islands" included the adja-

cent waters and submerged lands as well as the upland islands. *Id.* at 89. The facts in *Alaska Pacific Fisheries,* are instructive. In that case, a commercial fishing operation had erected a large fish-trap offshore near the island on which the Indians had settled. The Court indicated that the trap would catch about 600,000 salmon a season which would substantially reduce the natural supply of fish accessible to the Indians. 248 U.S. at 87. The use of the adjacent fishing grounds was found to be essential to the Indian's survival. Based on its finding that the Indians of the reservation could not have sustained themselves on the upland areas alone, the Court concluded that Congress intended to convey the lands beneath navigable waters as part of the reservation. In its *Montana* decision, the Court indicated that the lifestyle of the Crow Tribe was unlike that of the Indians in *Alaska Pacific Fisheries:*

> [e]ven though the establishment of an Indian reservation can be an 'appro- priate public purpose' within the meaning of *Shively v. Bowlby,* 152 U.S., at 48, justifying a congressional conveyance of a riverbed, *see, e.g., Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 85, the situation of the Crow Indians at the time of the treaties presented no 'public exigency' which would have required Congress to depart from its policy of reserving ownership of beds under navigable water for the future States. *See Shively v. Bowlby, supra,* at 48. *As the record in this case shows, at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life.*

Montana v. United States, 450 U.S. at 556.

Thus, we conclude that the Supreme Court's decision in *Montana* permits a court to infer congressional intent to convey the bed beneath navigable waters if the Indians can prove they depended heavily on the particular body of water. *See Puyallup Tribe of Indians v. Port of Tacoma*, 525 F. Supp. 65 (W.D. Wash. 1981).

Unlike *Alaska Pacific Fisheries*, the Tribes' history and lifestyle in this case do not provide grounds for an exception to the equal footing doctrine. The record does not reflect that the Indians were so dependent on the river that Congress would have intended to depart from the equal footing doctrine and convey the river bed. The Tribes have submitted considerable scholarly documentation to support a finding that a "public exigency" existed to justify a grant of the riverbed. We find this authority unpersuasive.

The issue of aboriginal title was presented to this court on rehearing. Unfortunately the record from the district court does not allow us to make a determination on this issue. However, we do feel the issue is of sufficient import to allow the parties to address it on remand.

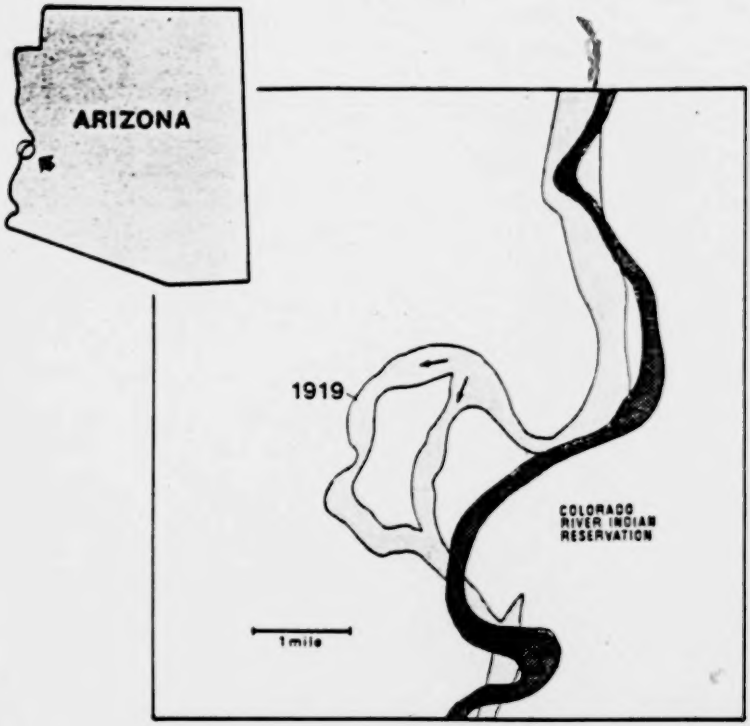
IV

Although it is true that conveyances by the United States during a state's territorial period are not lightly to be inferred. *United States v. Holt State Bank*, 270 U.S. 49, 55, 46 S.Ct. 197, 199, 70 L.Ed. 465 (1926), it is nevertheless within the power of the United States to make such conveyances if it so desires, *Shively v. Bowlby*, 152 U.S. 1, 48, 14 S.Ct. 548, 566, 38 L.Ed. 331 (1894). We find the evidence in this case insufficient to enable us to conclude

that the government intended to convey the eastern half of the riverbed to the Indians when it formed the Reservation. Accordingly, we hold that the eastern half of the river bed was not conveyed by the government to the Indians as part of the Reservation.

The judgment of the district court is affirmed in part, reversed in part and remanded. On remand the district court should determine the issue of aboriginal title and the correct boundary of the Reservation.

APPENDIX C.



CHANNEL OF THE COLORADO RIVER (PALO VERDE VALLEY) BEFORE 1920 CUTOFF AND TODAY

SOURCE: EXHIBIT #25

Office-Supreme Court, U.S.
FILED
AUG 31 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-233

In the Supreme Court

OF THE

United States

OCTOBER TERM 1983

COLORADO RIVER INDIAN TRIBES,
Petitioner,

vs.

GERALD ARANSON, et al.,
Respondents.

SUPPLEMENTAL APPENDICES

RUSSEL LAWRENCE BARSH
COUNSEL OF RECORD
SIDNEY C. FLORES
FLORES, ESTREMERA & BARRIOS
95 South Market Street,
Suite 250
San Jose, California 95113
Telephone: (408) 292-3400
Counsel for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

Page

APPENDICES

D. Order Denying Rehearings (May 13, 1983) A-51

E. Judgment of District Court (January 11, 1977) A-52

F. Findings of Fact and Conclusions of Law of District Court (January 11, 1977) A-55

Appendix D

United States Court of Appeals
For the Ninth Circuit

No. 77-2295

United States of America,
Plaintiff-Appellee,

v.

Gerald Aranson, et al.,
Defendants-Appellants.

[Filed May 13, 1983]

ORDER

Before: TRASK and SNEED, Circuit Judges, and EAST*, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Appendix E

William D. Keller
United States Attorney
Frederick M. Brosio, Jr.
Assistant U. S. Attorney
Chief, Civil Division
Donald J. Merriman
Assistant U. S. Attorney
1100 U. S. Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 688-2409
Attorneys for Plaintiff

United States District Court
Central District of California

No. 72-1621-R Civil

United States of America,
Plaintiff,

v.

Gerald Aranson, et al.,
Defendants.

[Filed Feb. 11, 1977]

JUDGMENT

This matter having regularly come before the court, the court having considered the records and files herein, and the court having made its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The plaintiff, United States of America, is the owner in trust for the Colorado River Indian Tribes of the real property and premises lying westerly of the course of the Colorado River, described as follows:

The lands as shown on the Bureau of Land Management survey of Township 4 North, Range 22 West, Gila and Salt River Meridian, Arizona and California, accepted July 9, 1974, and officially filed September 25, 1974.

Fractional Sections 3, 4, 8, 9, 10, 11, 14, 15, 16, 17 and 21, Township 4 North, Range 22 West, Gila and Salt River Base and Meridian.

2. The title to said lands is quieted in plaintiff and the possession by the defendants, and each of them, of said property is, and has been, without any right, title or interest therein;

3. Plaintiff recover possession of said real property and premises wrongfully occupied by the defendants;

4. The defendants forthwith remove themselves and all personal belongings from said real property and premises, wrongfully occupied by them;

5. The defendants may not and shall not in any manner interfere with plaintiff's right to administer, possess, and control said real property and premises following the entry of this judgment;

6. The defendants cease and desist from trespassing on said real property and premises following the entry of this judgment;

7. Plaintiff shall have and recover of defendants Jared C. John, Jr., Alice B. John, Rancho Del Juan, Inc., and Neil John, and each of them, the sum of $44,500.00.

8. Plaintiff shall have and recover of defendant Palo Verde Irrigation District the sum of $9,800.00.

9. Plaintiff shall have and recover its costs in the sum of $....., against the defendants except the State of California and except defendants Arizona Farmers Production Credit Association; the Federal Land Bank of Berkeley; Northwestern Mutual Life Insurance Company; Desert Ginning Company, Inc., an Arizona Corporation; Los Angeles Period Furniture Company, Inc.; Julius Fligelman, and Bank of America National Trust and Savings Association.

DATED: This 10th day of February, 1977.

/s/ MANUEL L. REAL
United States District Judge

Presented by:

William D. Keller
United States Attorney

Frederick M. Brosio, Jr.
Assistant U.S. Attorney
Chief, Civil Division

By DONALD J. MERRIMAN
Donald J. Merriman
Assistant U.S. Attorney

Attorneys for Plaintiff.

Appendix F

William D. Keller
United States Attorney
Frederick M. Brosio, Jr.
Assistant U. S. Attorney
Chief, Civil Division
Donald J. Merriman
Assistant U. S. Attorney
1100 U. S. Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 688-2409
Attorneys for Plaintiff.

United States District Court
Central District of California

No. 72-1621-R Civil

United States of America,
Plaintiff,

v.

Gerald Aranson, et al.,
Defendants.

[Filed Feb. 11, 1977]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled case came on regularly for trial commencing on November 3, 1976, and continuing thereafter on November 4, 5, 15, 16 and 17, 1976, before the Honorable

Manuel L. Real, United States District Court Judge, sitting without a jury. Plaintiff appeared by William D. Keller, United States Attorney, Central District of California, Frederick M. Brosio, Jr., Assistant United States Attorney, Chief, Civil Division, and Donald J. Merriman, Assistant United States Attorney, by Donald J. Merriman; defendant, State of California was represented by Evelle J. Younger, Attorney General, and Jerold A. Krieger, Deputy Attorney General, by Jerold A. Krieger; defendant, Palo Verde Irrigation District was represented by Roy H. Mann, Esquire; all other defendants were represented by Donald D. Stark, Esquire, and Frederick H. Kranz, Jr., Esquire. The court having considered the oral and documentary evidence offered and received at the trial, and the argument of counsel, and being fully advised in the premises makes the following findings of fact and conclusions of law:

PREFACE

This action was brought by the United States of America, as trustee for the benefit of the Colorado River Indian Tribes, to quiet title to certain lands along the Colorado River within Riverside County, California, alleged to be a part of the Colorado River Indian Reservation, to eject the persons in possession of said lands, and to recover damages for the withholding of possession of said lands from the Colorado River Indian Tribes.

FINDINGS OF FACT

1. Title to the lands in the area in dispute was originally acquired by the United States under the Treaty of Guadalupe Hidalgo. The Colorado River Indian Reservation was originally established and the lands therein defined by Con-

gress by the Act of March 3, 1865 (13 Stat. 559). Subsequently, the lands included therein were modified and further defined by Executive Orders of November 22, 1873, November 16, 1874, May 15, 1876, and November 22, 1915. The Act of April 30, 1964 (78 Stat. 188) defined the Colorado River Indian Reservation as constituting the reservation for Indian use established by said Act of March 3, 1865, as modified and further defined by said Executive Orders of November 22, 1873, November 16, 1874, May 15, 1876 and November 22, 1915.

2. The Executive Order of May 15, 1876 (admitted in evidence herein as Exhibit 90) purported to include within said reservation the entire bed of the Colorado River; however, prior thereto by the Act of September 9, 1850 (9 Stat. 452), Congress admitted California to statehood, and the eastern boundary of the state of California at that time, as pertinent to this lawsuit, was acknowledged by Congress to be the mid-line of the Colorado River. The Act of September 9, 1850, admitted California on an equal footing with the original States; hence, because the Colorado River has been held to be navigable in this reach by the United States Supreme Court, California obtained title to the west one-half of the river bed on said date. Accordingly, the Executive Order of May 15, 1876, effectively reserved to the Colorado River Indian Tribes only the east half of the bed of the Colorado River, and to the extent that said Order purported to include within the reservation the west half of the bed of the river, it was ineffective.

3. The lands to which the United States seeks by this action to quiet its title are described generally as follows:

Fractional Sections 3, 4, 8, 9, 10, 11, 14, 15, 16, 17 and 21, Township 4 North, Range 22 West, Gila and Salt

River Base and Meridan, as shown on the plat of survey accepted July 9, 1974;

all of said portions of Township 4 North, Range 22 West, G.&S.R.B.&M. are now, and ever since the Executive Order of May 15, 1876 have been, a part of the Colorado River Indian Reservation.

4. Said Township 4 North (Township 4 North, Range 22 West, G.&S.R.B.&M.), and other townships within the Colorado River Indian Reservation were originally surveyed in 1912 on behalf of the General Land Office by Guy P. Harrington, a U.S. surveyor, and his survey is in evidence in this action as Exhibit 7. Said Township 4 North as surveyed and certain accretions thereto constitute the lands described in paragraph 3.

5. During the interval between the General Land Office (Harrington) survey of 1912 and the latter part of 1919, the Colorado River in the reach of the river adjacent to said Township 4 North moved generally in a westerly direction by a process of erosion and accretion; the configuration of the river in said area in 1919 resembled a large loop, and was referred to locally as the Olive Lake Bend.

6. To the extent that the land in the 1919 Olive Lake Bend easterly of the Colorado River had not been surveyed by Harrington, it was land that had accreted to Township 4 North, Range 22 West, G.&S.R.B.&M., as surveyed in 1912.

7. The location of the Colorado River in the reach of the river adjacent to said Township 4 North and in the

configuration of the Olive Lake Bend was recorded in a survey in December 1919 by C. A. Engle, a civil engineer, employed by the Indian Service. The Engle survey and the survey notes with respect thereto are in evidence in this action as Exhibits 25 and 26 respectively.

8. In the early part of 1920, the Palo Verde Mutual Water Co. applied to and received permission from the United States Department of the Interior to construct, and it did construct, a cut-off channel across the neck of the Olive Lake Bend on lands wholly within the Colorado River Indian Reservation. The purpose of the cut-off was to divert the river through the cut and thereby eliminate a threat posed by the river of destroying the irrigation system and farm lands in the Palo Verde Valley.

9. By July, 1920, the main stream of the Colorado River was flowing through the cut-off constructed by the Palo Verde Mutual Water Co., and by 1921 the entire river was flowing through the cut-off. Thereafter the main stream of the river did not ever return to or flow through its former channel known as the Olive Lake Bend.

10. The diversion of the Colorado River from its course around the loop known as the Olive Lake Bend into and through the cut-off constructed across the neck of the bend by the Palo Verde Mutual Water Co. constituted an avulsive change in the course of the Colorado River.

11. Immediately prior to said avulsive change, the course and bed of the Colorado River was the westernmost of the two channels shown on the Engle maps, Exhibits 25 and 27, which position of the river is supported by the Yost sketch map, Exhibit 28, labeled "Colorado River 1920".

12. At the time of said avulsive change in the course of the river referred in Finding 10 above, the median line of the channel it had abandoned is properly defined in Exhibit 9, which is in evidence, the same being entitled "Township 4 North, Range 22 West, of the Gila and Salt River Meridian, Arizona and California. Dependent Resurvey and Accretion Survey." The traverse of said median line is as described in said Exhibit 9.

13. The median line referred to in the next preceding finding constitutes, in part, the western boundary of the Colorado River Indian Reservation.

14. With respect to the lands shown on said Exhibit 9, as lying between the Colorado River as shown on Exhibit 9 and the median line as shown and described on Exhibit 9, said lands, comprising about 1912 acres, are owned by the United States of America in trust for the benefit of the Colorado River Indian Tribes. No part of said lands have ever been disposed of by the United States of America by patent or otherwise.

15. All that part of the abandoned bed of the Colorado River lying westerly of the median line described on Exhibit 9, as of the time the river commenced flowing through the cut-off constructed by the Palo Verde Mutual Water Co. is owned by the State of California.

16. All defendants, except the State of California and those defendants listed hereafter in Finding 23, have wrongfully occupied and do now wrongfully occupy the lands described in Finding No. 14, and have unlawfully withheld and do now unlawfully withhold possession thereof from the plaintiff contrary to its title and right to possession.

17. All defendants, except the State of California and those defendants listed hereafter in Finding 23, have failed and refused to compensate plaintiff for their unlawful use and occupancy of said lands, and plaintiff is entitled to damages therefor.

18. The fair rental value for the unlawful use and occupancy of the lands occupied by the Johns Group of defendants is the sum of $44,500.

19. The plaintiff and the defendant Palo Verde Irrigation District have agreed that the fair rental value for the unlawful use and occupancy of 38 acres of lands traversed by the District's duplicate main canal is $9,800.

20. The fair rental value for the unlawful use and occupancy of the lands occupied by the Riverview Farm and Cattle Company Group of defendants is $330,000; however, said damages are off-set in their entirety by enhancement of the value of the land occupied by said defendants, as a result of the unamortized value of good faith improvements made by said defendants.

21. The defendants within the Johns Group of defendants are:

Jared C. John, Jr., and Alice B. John, his wife;

Rancho Del Juan, Inc., an Arizona corporation; and Neil John, individually and as President of Rancho Del Juan Inc.

22. The defendants within the Riverview Farm and Cattle Company Group of defendants are:

Gerald Aranson and Jan Furst Aranson, his wife;

Blythe Land Properties, a Limited Partnership;

Joe B. Finley, individually and as President of Western Cattle Feeders, and Florence S. Finley, his wife;

Murray M. Hausner and Leonore Hausner, his wife;

Edward Meltzer and Frieda A. Meltzer, his wife;

Arthur Ourieff and Verni Ourieff, his wife;

Jack M. Ostrow;

Prima Rosa Land and Cattle Company, a partnership;

Arthur I. Berman;

Martin A. Levy;

Western Cattle Feeders, a California corporation;

Palo Verde Irrigation District, a political subdivision of the State of California;

Virgil L. Jones, individually and as President of Board of Trustees of Palo Verde Irrigation District;

C. P. Richins and Sons, a Partnership;

Charles P. Richins, Jr., and Agnes Richins, his wife;

Norman E. Richins and Winifred Richins, his wife;

Lawrence D. Richins, individually and as President of Sunrise Farms and as President of Riverview Farm and Tillage Company and Barbara Richins, his wife;

Riverview Farm and Cattle Company, a Partnership;

Arnold M. Travis and Joan D. Travis, his wife;

Riverview Land Company, a California corporation;

C. P. Richins, individually and as President of Riverview Land Company;

Sunrise Farms, a California corporation;

Harry B. Swerdlow;

Travis Farms, a Partnership;

Joe B. Finley, Jr., and Mary C. Finley, his wife;

R. W. Bilbo and Kathryn S. Bilbo, his wife;

23. The following defendants have no interest in the lands which are the subject of this action:

Arizona Farmers Production Credit Association;

The Federal Land Bank of Berkeley;

Northwestern Mutual Life Insurance Company,

Desert Ginning Company, Inc., an Arizona corporation;

Los Angeles Period Furniture Company, Inc.,

Julius Fligelman;

Bank of America National Trust and Savings Association.

Any conclusion of law erroneously included within the foregoing findings of fact shall be deemed a conclusion of law.

CONCLUSIONS OF LAW

24. This court has subject matter and venue jurisdiction of these proceedings.

25. The lands described in Finding 14 were a part of the Colorado River Indian Reservation as confirmed by the Act of April 30, 1964 (78 Stat. 188)

26. In case of an avulsive change in the channel of a river which constitutes a boundary, the boundary remains in the abandoned channel as it existed immediately prior to the avulsive change.

27. The 1920 cut-off constituted an avulsive change in the channel of the Colorado River and worked no change in the western boundary of the Colorado River Indian Reservation.

28. Plaintiff in its capacity as trustee for the benefit of the Colorado River Indian Tribes is now and has at all times been the owner of and entitled to possession, to the exclusion of the defendants, of Township 4 North, Range 22 West, of the Gila and Salt River Meridian, Arizona and California, as said township is laid out and depicted in that certain plat of survey consisting of two sheets accepted July 9, 1974, and officially filed in the offices of the Bureau of Land Management of the Department of the Interior on September 25, 1974, the same being entitled "Township 4 North, Range 22 West, of the Gila and Salt River Meridian, Arizona and California. Dependent Resurvey and Accretion Survey", a copy of said plat having been received in evidence in this action designated as Exhibit 9.

29. Plaintiff is entitled to have judgment quieting its title to the lands described in paragraph 28 above, as against all defendants and to have judgment that the boundary line between the plaintiff's lands and the land owned by the State of California in the abandoned river bed of the Colorado River is the traverse of the median line of said abandoned channel as shown and described on said plat of survey described in paragraph 28 above.

30. Plaintiff is entitled to have judgment against all defendants, except the State of California, that said defendants have wrongfully occupied and do now wrongfully occupy all lands lying between the Colorado River as shown on the plat of survey described in paragraph 28 above and the median line of said abandoned channel as shown and described on said plat of survey.

31. By reason of such wrongful and unlawful withholding of possession from plaintiff, plaintiff is entitled to have and recover from the Johns Group of defendants the sum of $44,500, and from the defendant Palo Verde Irrigation District the sum of $9,800.

Any finding of fact erroneously included within the foregoing conclusions of law shall be deemed a finding of fact.

DATED: This 10th day of February, 1977.

/s/ MANUEL L. REAL
United States District Judge

Presented by:
William D. Keller
United States Attorney
Frederick M. Brosio, Jr.
Assistant U. S. Attorney
Chief, Civil Division

By DONALD J. MERRIMAN
Donald J. Merriman
Assistant U. S. Attorney
Attorneys for Plaintiff.

(THIS PAGE INTENTIONALLY LEFT BLANK)

Office-Supreme Court, U.S.
FILED
OCT 12 1983
ALEXANDER L. STEVAS
CLERK

No. 83-233

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

COLORADO RIVER INDIAN TRIBES,
Petitioner,

v.

GERALD ARANSON, et al.,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF ARIZONA'S BRIEF IN OPPOSITION

ROBERT K. CORBIN
Attorney General
ANTHONY B. CHING
Solicitor General
(Counsel of Record)
State of Arizona
1275 West Washington
Phoenix, Arizona 85007
(602) 255-3333

TABLE OF CONTENTS

Page:

Argument
The Court of Appeals' Decision is Correct 2

Conclusion 4

TABLE OF AUTHORITIES

CASES: *Page:*

Alaska Pacific Fisheries v. United States 4
248 U.S. 18 (1918)

Arizona v. California 3
373 U.S. 546 (1963)

Arizona v. California 4
_____ U.S. _____, 103 S.Ct. 1382 (1983)

Choctaw Nation v. Oklahoma 3
397 U.S. 620 (1970)

Montana v. United States 2, 3
450 U.S. 544 (1981)

United States v. Appalachian Power Co. 4
311 U.S. 377 (1940)

United States v. Holt State Bank 3
270 U.S. 49 (1926)

STATUTES

Act of March 3, 1965 . . . . . 2, 3
13 Stat. 541

Arizona California Boundary Compact 2
80 Stat. 340 (1966)

No. 83-233

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

COLORADO RIVER INDIAN TRIBES,

Petitioner,

v.

GERALD ARANSON, et al.,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF ARIZONA'S BRIEF IN OPPOSITION

ARGUMENT

THE COURT OF APPEALS' DECISION IS CORRECT.

In deciding that Congress did not convey the bed of the Colorado River to the Colorado River Indian Tribes, the Court of Appeals correctly applied this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981). *Montana* held that Congress is presumed "to hold such land in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an 'equal footing' with the established States", *Id.* at 551, unless Congress intended otherwise "in clear and especial words", or "definitely declared or otherwise made very plain", or "unless the claim confirmed in terms embraced the land under the waters of the stream." *Id.* at 554.

Applying the above holding to this case, we find the following language in the Act creating the Colorado River Indian Reservation:

> All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock *on the Colorado River*, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries.
> *Act of March 3, 1965*, 13 Stat. 541, 559 (emphasis supplied).

It is noteworthy that this Act was passed subsequent to California's statehood in 1850 and could not have conveyed the western half of the river bed which already belonged to California.[1] Moreover, nowhere in the Act is there any reference to the conveyance of the river bed to the Indian Tribes in either "clear or especial words" or in words "definitely declared or otherwise made very plain". The meaning

---

[1] The argument that the boundary between Arizona and California was not established until the Boundary Compact of 1966 is specious. The boundary had always been the Colorado River. The Boundary Compact was necessary only because of the meanderings of the Colorado River over the years, making the physical boundary difficult to ascertain. See Article 1 of the *Arizona California Boundary Compact*, 80 Stat. 340 (1966).

of the Congressional Act is clear. The mere reference to landmarks *on the Colorado River* cannot be construed to mean the conveyance of the river bed.

Petitioner argues that an Executive Order of May 15, 1876 referred to the "west bank of the Colorado" and therefore the United States conveyed the river bed to the Indian Tribes. That argument is fallacious. Firstly, *Montana* made it clear that only Congress can convey the river bed. Secondly, the reference to the west bank at most included the river in the reservation but did not convey the title to the river bed.[2] The inclusion of the river, itself, within an Indian reservation did not convey the river bed to the Indians. *Montana v. United States, supra.* Nor did the inclusion of a lake within an Indian reservation convey the lake bed to the Indians. *United States v. Holt State Bank*, 270 U.S. 49 (1926).

Petitioner's reliance upon *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), is misplaced. In *Montana*, this Court carefully explained that *Choctaw* is a singular exception in an established line of cases and that "the conveyance of the river bed in *Choctaw* was based on very peculiar circumstances . . . ." *Id.* at 555, n. 5. This Court explained that, in the Choctaw treaty, which was similar in content to the Cherokee treaty, the United States "pledged that 'no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation . . . and that no part of the land granted to them shall ever be embraced in any Territory or State'. [Citation omitted]." *Id.* at 555, n. 5. Like the Crow treaties in *Montana*, the surrounding circumstances and language of the Congressional Act of 1865, creating the Colorado River Indian Reservation, in no way come close to the facts in *Choctaw*.

Next, there is no "public exigency" to require Congress to depart from its policy of reserving ownership of beds

---

[2] "[T]he mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the river bed part of the conveyed land, especially when there is no express reference to the river bed that might overcome the presumption against its conveyance." *Montana v. United States, id* at 554.

under navigable waters for the future states. Petitioner acknowledges that the Colorado River Indian Tribes existed mainly on farming. The inclusion of the Colorado River in the reservation assures them a supply of water for agriculture. In fact, this water supply is assured under the implied reservation of water rights doctrine. See *Arizona v. California*, 373 U.S. 546 (1963). See also *Arizona v. California*, _____ U.S. _____, 103 S.Ct. 1382 (1983). That doctrine in no way implicates the ownership of the river bed. *Id.* at 597. Unlike the facts in *Alaska Pacific Fisheries v. United States*, 248 U.S. 18 (1918), the Indians' rights to water or to fishing are in no way impaired by the states' ownership of the river bed. *Alaska Pacific Fisheries*, therefore, has no application here. Moreover, the right of a riparian owner to use water from the river does not carry with it the ownership of the river bed of a navigable stream. Most certainly, the grant of water rights by Congress does not convey the bed of that navigable stream. On the contrary, the water users' rights are always subject to the sovereign's navigational servitude from which Arizona's ownership of riverbed is derived. *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940).

Lastly, petitioner's argument concerning its aboriginal claims is not properly before this Court. Since that issue was first raised in the Court of Appeals by the Indian tribe, the Court of Appeals' decision specifically remanded it to the district court for its decision.

CONCLUSION

The decision of the Court of Appeals is correct. There is no basis for the certiorari to be granted.

Respectfully submitted this 11th day of October, 1983.

ROBERT K. CORBIN
Attorney General

ANTHONY B. CHING
Solicitor General (Counsel of Record)
State of Arizona
1275 West Washington Street
Phoenix, Arizona 85007
Telephone: (602) 255-3333

Office-Supreme Court, U.S.
F I L E D
SEP 21 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-233

In The
Supreme Court of the United States
October Term 1983

COLORADO RIVER INDIAN TRIBES,
Petitioner,

vs.

GERALD ARANSON, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CALIFORNIA'S BRIEF IN OPPOSITION

JOHN K. VAN DE KAMP
Attorney General of the
State of California
N. GREGORY TAYLOR
Assistant Attorney General
KENNETH R. WILLIAMS
(Counsel of Record)
Deputy Attorney General
1515 K Street, Suite 515
Sacramento, California 95814
Telephone: (916) 324-5501
Counsel for Respondent
State of California

COCKLE PRINTING CO., 2111 Douglas St., Omaha 68102

QUESTION PRESENTED

Should this court grant discretionary review of a case where the issues presented for review were:

1. Not presented to the Court of Appeals; or
2. Remanded by the Court of Appeals to the District Court for consideration; or
3. Correctly decided by the Court of Appeals in accordance with this court's recent decision in *Montana v. United States* (1981) 450 U. S. 544?

TABLE OF CONTENTS

Pages

Question Presented i

Opinions Below 1

Jurisdiction 2

Statutory Provisions Involved 2

Statement of the Case 5

Argument:

A. The District Court's Determination That California Owns The Western Half Of The Colorado Riverbed Was Not Appealed And Is Binding On All The Parties. 8

B. The Court Of Appeals Correctly Concluded That The Eastern Half Of The Bed Of The Colorado River Was Not Conveyed To The Tribes As A Part Of The Reservation. 11

C. The Petitioner's Arguments Concerning Aboriginal Title Are Premature And Should Be Decided By The District Court On Remand. 14

Conclusion 15

TABLE OF AUTHORITIES

CASES

Adickes v. Kress & Co.
(1979) 390 U. S. 144 10

Alaska Pacific Fisheries v. United States
(1918) 248 U. S. 78 ..... 13, 14

TABLE OF AUTHORITIES—Continued

Pages

Alaska Pacific Fisheries v. United States
(1917) 240 Fed. 274 14

Arizona v. California
(1963) 373 U. S. 546 12

Arizona v. California
(March 30, 1983) — U. S. —, 103 S. Ct. 1382 10

Carpenter v. Santa Monica
(1944) 63 Cal. App. 2d 772 7

Choctaw Nation v. Oklahoma
(1970) 397 U. S. 620 13

Darr v. Burford
(1950) 339 U. S. 200 15

Illinois Central Railroad Co. v. Illinois
(1892) 146 U. S. 387 11

Oregon ex rel. State Land Board v.
Corvallis Sand and Gravel Co.
(1977) 429 U. S. 363 6

People v. California Fish
(1913) 166 Cal. 576 11

Montana v. United States
(1980) 450 U. S. 544 ..... passim

Montana, et al. v. United States, et al.
(1981) 450 U. S. 544 11

United States v. Aranson
(1983) 696 F. 2d 654 ..... 1, 5, 8, 12, 14

TABLE OF AUTHORITIES—Continued

Pages

United States v. Holt State Bank
(1926) 270 U. S. 48 ..... 13, 14

Wilson v. Omaha Indian Tribe
(1979) 442 U. S. 653 7

STATUTES, CODES & OTHER AUTHORITIES

Act of September 9, 1850
ch. 49, 9 Stats. 446 3

Act of September 9, 1850
ch. 50, 9 Stats. 452 2

ch. 50, 9 Stats. 452, § 1 3

Act of February 24, 1863
ch. 56, 12 Stats. 664 4

Act of March 3, 1865
ch. 127, 3 Stats. 541 4

Arizona Rev. Stats. ann., §§ 41-522 11

Black's Law. Dict. (rev. 4th ed.)
p. 195, defining river "bed" 13

Cal. Comp. Laws at 584 3

Cal. Const. of 1849, art. XII 3

Cal. Govt. Code, § 175 11

Proclamation of February 14, 1912
37 Stats., pp. 1728-1729 4

1862 Cal. Stats. 432 11

28 U. S. C., § 1254(1) 2

No. 83-233

In The

Supreme Court of the United States

October Term 1983

COLORADO RIVER INDIAN TRIBES,

Petitioner,

vs.

GERALD ARANSON, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CALIFORNIA'S BRIEF IN OPPOSITION

Respondent, the State of California, hereby submits this brief in opposition to the Petition for a Writ of Certiorari which seeks review of a decision by the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at *United States v. Aranson* (1983) 696 F. 2d 654. The judgment and findings of the United States District Court for the Central District of California

were not reported; they are attached to the petition as Supplemental Appendices E and F.

JURISDICTION

Petitioners seek to invoke this court's jurisdiction under 28 United States Code section 1254(1). For the reasons outlined below, it is recommended that the court decline to exercise its jurisdiction in this case.

STATUTORY PROVISIONS INVOLVED

Act of September 9, 1850, chapter 50, 9 Statutes 452

The description of California's boundaries appears in California's Constitution of 1849 which was approved by Congress on September 9, 1850. (Act of September 9, 1850, ch. 50, 9 Stats. 452; exh. 6.) It describes California's eastern boundary as:

> ". . . Commencing at the point of intersection of the forty-second degree of north latitude with the one hundred-twentieth degree of longitude west from Greenwich, and running south on the line of said one hundred-twentieth degree of west longitude until it intersects the thirty-ninth degree of north latitude; thence running in a straight line in a southeasterly direction *to the River Colorado, at a point where it intersects the thirty-fifth degree of north latitude; thence down the middle of the channel of said river, to the boundary line between the United States and*

> *Mexico,* as established by the treaty of May thirtieth, one thousand eight hundred forty eight; . . . ." (Cal. Const. of 1849, art. XII (1853); Cal. Comp. Laws at 584; exh. 5. Emphasis added.)

The State of California includes the western half of the Colorado River. This act also provides that California is to be "admitted into the Union on an equal footing with the original states in all respects whatever." (Act of September 9, 1850, ch. 50, 9 Stats. 452, § 1.)

Act of September 9, 1850, chapter 49, 9 Statutes 446

On the same day that California was admitted to the Union, Congress created the Territory of New Mexico. (Act of September 9, 1850, ch. 49, 9 Stats. 446 at 447, et seq.) The act describes the new territory's boundaries as follows:

> "*Beginning at a point in the Colorado River* where the boundary line with the republic of Mexico crosses the same; thence eastwardly with the said boundary line to the Rio Grande; thence following the main channel of said river to the parallel of the thirty-second degree of north latitude; thence east with said degree to its intersection with the one hundred and third degree of longitude west of Greenwich; thence north with said degree of longitude to the parallel of thirty-eight degree of north latitude; thence west with said parallel to the summit of the Sierra Madre; thence south with the crest of said mountains to the thirty-seventh parallel of north latitude; *thence west with said parallel to its intersection with the boundary line of the State of California; thence with said boundary line to the place of beginning.*" (Emphasis added.)

Thus, the Territory of New Mexico included the eastern half of the bed of the Colorado River.

Act of February 24, 1863, chapter 56, 12 Statutes 664

Twelve years later the Territory of Arizona was established from that portion of the Territory of New Mexico which included the eastern half of the Colorado River. (Act of February 24, 1863, ch. 56, 12 Stats. 664.) The act provides:

> "That all that part of the present Territory of New Mexico situate west of a line running due south from the point where the southwest corner of the Territory of Colorado joins the northern boundary of the Territory of New Mexico to the southern boundary line of said Territory of New Mexico be, and the same is hereby, erected into a temporary government by the name of the Territory of Arizona."

Arizona was declared a state on an equal footing with all other states in 1912. (Proclamation of February 14, 1912, 37 Stats., pp. 1728-1729.)

Act of March 3, 1865, chapter 127, 13 Statutes 541

Three years later, the Colorado River Indian Reservation (CRIR) was created within the boundaries of the Territory of Arizona (Act of March 3, 1865, ch. 127, 3 Stats. 541, 559.) The act in relevant part provided:

> "All that part of the public domain *in the Territory of Arizona*, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries." (Emphasis added.)

STATEMENT OF THE CASE

This is a quiet title action initiated in 1972 by the United States on behalf of the Indian Tribes (Tribes) of the CRIR. The dispute concerns the location of the western boundary of that reservation and the Colorado River. The United States named the private property owners in the area and California as defendants. California was named because of her interest in the western half of the bed of the Colorado River.

The trial of this case was conducted during November 1976. The District Court issued its judgment and findings on February 11, 1977. (See Supp. Appens. E and F to the Petition).

The District Court found that the median line of the Colorado River was the western boundary of the CRIR (Finding 13). The court concluded that California owned the western half of the bed of the Colorado River (Findings 2 and 15). The court also determined that the Colorado River allusively changed its location in 1920 creating an abandoned loop known as the Olive Lake Bend (Finding 10). Consequently, the District Court concluded that the western boundary of the CRIR was the median line of Olive Lake Bend; California owned the abandoned riverbed west of the median line.

The District Court's conclusion that California owns the western half of the bed of the Colorado River was not appealed. Indeed, the Court of Appeals recognized that that aspect of the District Court's judgment is *res judicata* and binding on the parties to that judgment. (*United States v. Aranson, supra,* 696 F. 2d at 662.)

The private parties did appeal two other aspects of the District Court judgment. First, they argued that state law should have been applied and that state law would have affected the District Court's determination of the location of the Colorado River. (See *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.* (1977) 429 U. S. 363.) Second, the appellants argued that the CRIR did not include the eastern half of the riverbed; it was held in trust by the United States for the future state of Arizona. (See *Montana v. United States* (1980) 450 U. S. 544.) However, the appellants also contend that they adversely possessed any interest that Arizona may have to the eastern half of the riverbed.

Arizona, which was not a party to the District Court judgment, was granted leave to intervene on appeal. Arizona agreed with the appellants that the CRIR did not include the eastern half of the riverbed. However, Arizona disagreed with the contention that her sovereign interest in the eastern half of the riverbed was lost by adverse possession.

The Tribes were also granted leave to intervene on appeal. The Tribes recognized that they had received a favorable judgment in the District Court as a result of the United States representation. However, the Tribes were concerned that the United States might concede certain issues on appeal in light of the *Montana v. United States* case.

Although California did not appeal the District Court judgment, she did file an amicus curiae brief in the Court of Appeals on the choice of law issue. California argued that state law should be adopted as the federal rule of

decision. (See *Wilson v. Omaha Indian Tribe* (1979) 442 U. S. 653.) However, California also noted that the adoption of state law would not have affected the outcome in this case. (See *Carpenter v. Santa Monica* (1944) 63 Cal. App. 2d 772.)

After rehearing, the Court of Appeals issued its decision on January 7, 1983. That decision was divided into two parts. In the first half of the decision, written by Judge Sneed, the court agreed with the arguments raised in California's amicus curiae brief. The court held that although federal law would adopt state law as the rule of decision, the application of state law would not have affected the location of the river or outcome in this case. Consequently the Court of Appeals affirmed this aspect of the District Court's judgment.

In the second half of the decision, written by Judge Trask, the court discussed the issue of whether the CRIR includes the eastern half of the Colorado Riverbed. The court held that the United States, when creating the CRIR, did not intend to convey the eastern half of the riverbed to the Tribes. The eastern half of the riverbed was held in trust for the future state of Arizona. (*Montana v. United States, supra.*) The court reversed the District Court judgment and remanded it for a determination of the east bank of the river, the correct boundary of the CRIR. The court also remanded the case to determine the issue of aboriginal title, which was presented for the first time on appeal.

ARGUMENT

A. The District Court's Determination That California Owns The Western Half Of The Colorado Riverbed Was Not Appealed And Is Binding On All The Parties.

The District Court specifically found that California owns the western half of the Colorado Riverbed in her sovereign capacity. (See Petition Supplemental Appens. E and F.) The Court of Appeals recognized that this determination was not appealed and therefore was final and binding on the parties. (*United States v. Aranson, supra,* 696 F. 2d 654, at p. 662.) Despite these facts, the petitioner is now apparently claiming an interest in the western half of the Colorado Riverbed. (See Petition, pp. 18-19.)

The petitioner states that the District Court made no findings with respect to California's interest in the western half of the riverbed. (See Petition, p. 4, fn. 1.) This is blatantly incorrect. The District Court made very specific findings with respect to California's interest in the riverbed. (See Petition, Supplemental Appens. E and F.)

The District Court's Findings of Fact No. 2 and 15 provide that:

> "2. The Executive Order of May 15, 1876 (admitted in evidence herein as Exhibit 90) *purported to include within said reservation the entire bed of the Colorado River; however, prior thereto by the Act of September 9, 1850* (9 Stat. 452), *Congress admitted California to statehood, and the eastern boundary of the state of California at that time, as pertinent to this lawsuit, was acknowledged by Congress to be the*

mid-line of the Colorado River. The Act of September 9, 1850, admitted California on an equal footing with the original States; hence, because the Colorado River has been held to be navigable in this reach by the United States Supreme Court, *California obtained title to the west one-half of the river bed on said date.* Accordingly, the Executive Order of May 15, 1876, effectively reserved to the Colorado River Indian Tribes only the east half of the bed of the Colorado River, and to *the extent that said Order purported to include within the reservation the west half of the bed of the river, it was ineffective.*"

"15. *All that part of the abandoned bed of the Colorado River lying westerly of the median line* described on Exhibit 9, as of the time the river commenced flowing through the cut-off constructed by the Palo Verde Mutual Water Co. *is owned by the State of California.*" (Emphasis added.)

Furthermore, Conclusion of Law No. 29 concludes that:

"29. Plaintiff is entitled to have judgment quieting its title to the lands described in paragraph 28 above, as against all defendants and to have judgment that the boundary line between the plaintiff's lands and the *land owned by the State of California in the abandoned river bed of the Colorado River is the traverse of the median line of said abandoned channel* as shown and described on said plat of survey described in paragraph 28 above." (Emphasis added.)

The District Court could not have been more explicit; California owns the western half of the riverbed. Based on this determination the District Court entered a judgment against all defendants *except* the State of California.

Obviously, California did not appeal the favorable District Court's judgment; nor did the United States. As noted above, the Court of Appeals recognized that this issue was not appealed and was therefore binding on the

parties. This Court does not ordinarily consider issues which were not presented to or considered by the Court of Appeals. (See *Adickes v. Kress & Co.* (1979) 390 U. S. 144, 147.)

Furthermore, the District Court's determination is binding on the Tribes, even though they had not yet intervened when the District Court rendered its judgment. The Tribes were represented by the United States on District Court level. This Court recently held, in an analgous situation, that the principles of res judicata and finality would govern where Indians intervene after an issue has been adjudicated. (*Arizona v. California* (March 30, 1983) — U. S. —, 103 S. Ct. 1382.) This Court, in language equally applicable to this case, held that:

> "Finally, the absence of the Indian Tribes in the prior proceedings in this case does not dictate or authorize relitigation of their reserved rights. As a fiduciary, the United States had full authority to bring the *Winters* rights [water rights] claims for the Indians and bind them in the litigation. *Heckman v. United States*, 224 U. S. 413 (1912). (Fn. omitted.) We find no merit in the Tribes contention that the United States' representation of their interests was inadequate whether because of a claimed conflict of interests arising from the government's interest in securing water rights for other federal property, or otherwise. The United States often represents varied interests in litigation involving water rights, particularly given the large extent and variety of federal land holdings in the West. See, e.g. *Colorado River Water Cons. District v. United States*, 424 U. S., at 805. The Government's representation of these varied interests does not deprive our decisions of finality."

Likewise, the United States had authority to represent the Indians in this case before the District Court.

The District Court determination that California owns the western half of the riverbed was not appealed. Furthermore, the Tribes are not claiming that United States' representations was inadequate. In fact, as noted above, the Tribes contend that the District Court's decision is "favorable to the Tribes" and should be affirmed. (See Petition, p. 4.) The District Court judgment that California owns the western half of the bed of the Colorado River is therefore final and binding on both the United States and the Tribes.[1]

B. The Court Of Appeals Correctly Concluded That The Eastern Half Of The Bed Of The Colorado River Was Not Conveyed To The Tribes As A Part Of The Reservation.

After extensive briefing and deliberation the Court of Appeals reached the conclusion that the federal government did not convey the eastern half of the Colorado Riverbed to the Tribes as a part of the CRIR. (*Montana, et al. v. United States, et al.* (1981) 450 U. S. 544.) This conclusion was inescapable in light of the principles outlined in *Montana v. United States, supra.*

In *Montana v. United States* the court outlined the "general principle" that the federal government holds lands under navigable waters "in trust for future states,

---

1. Even if the arguments raised by the Tribes were not barred, they could not have changed the outcome. First, the statute relied on by the Tribes (1862 Cal. Stats. 432) could not operate to convey state sovereign lands. (See *Illinois Central Railroad Co. v. Illinois* (1892) 146 U. S. 387 and *People v. California Fish* (1913) 166 Cal. 576.) Second, the Tribes' reliance on the Boundary Compact between Arizona is equally misplaced. The Compact established the political boundaries of the state; it had no effect on land titles, "public or private." (See Cal. Govt. Code, § 175; Arizona Rev. Stats. ann., §§41-522.)

to be granted to such states, when they enter the Union and assume sovereignty on an 'equal footing' with the established states." (*Id.* at p. 551.) There is a strong presumption against the conveyance of such lands by the United States. "[I]t will not be held that the United States conveyed such land except because of 'some international duty of public exigency'." The intention for such a conveyance must be "definitely declared" and made in "clear and especial words." (*Id.* at p. 552.)

Applying these principles to this case, the Court of Appeals determined that the eastern half of the bed of the Colorado River was not conveyed to the Tribes; it was held by the United States in trust for the future State of Arizona. The statutes and executive orders creating the CRIR are at best, from the petitioner's point of view, ambiguous. The intent to convey is not "definitely declared" in "clear and especial words." They contain no language which comes close to clearly conveying the eastern half of the riverbed to the Tribes. Furthermore, congressional intent could not be inferred from the lifestyle of the Tribes. As determined by the Court of Appeals: "The record does not reflect that the Indians were so dependent on the river that Congress would have intended to depart from the equal footing doctrine and convey the riverbed." (*United States v. Aranson, supra,* at p. 666.)[2] Conse-

---

2. The Tribes place a great deal of emphasis on the fact that they used the waters of the Colorado River for irrigation purposes. However, the Tribes' water rights have already been established and do not include ownership of the bed of the river. (See *Arizona v. California* (1963) 373 U. S. 546, 599.) Furthermore, the Tribes' cultivation of the uplands adjacent to

(Continued on next page)

quently, the United States held the eastern half of the riverbed in trust for Arizona. (*Montana v. United States, supra; United States v. Holt State Bank* (1926) 270 U. S. 48.)

The Tribes conspicuously avoid a detailed discussion of the *Montana v. United States* case. Furthermore, they do not even mention *United States v. Holt State Bank, supra,* the other major case relied on by the Court of Appeals.

Instead the Tribes rely almost entirely on the case of *Choctaw Nation v. Oklahoma* (1970) 397 U. S. 620. That case was described by this Court as the "singular exception" to an "established line of cases" which have established that a reservation grant does not include the beds of navigable waters. (*Montana v. United States, supra,* at pp. 542-543, see also *United States v. Holt State Bank, supra.*) Special historical considerations and a fee simple conveyance to the Indians combined to create this singular exception. The Court of Appeals, as outlined above, correctly concluded that such unique facts are not present in this case.

Similarly, the petitioners' reliance on *Alaska Pacific Fisheries v. United States* (1918) 248 U. S. 78, is misplaced. First, as pointed out by the Court of Appeals, the history and lifestyle of the tribes in this case do not

---

(Continued from previous page)

the riverbed does not establish their ownership to the riverbed. In fact, a riverbed by definition has no value for agricultural purposes. (See Black's Law. Dict. (rev. 4th ed.) p. 195, defining river "bed".)

provide grounds for an exception to the equal footing doctrine. Second, the *Alaska Pacific Fisheries* case, unlike the present case, or *Montana v. United States, supra,* did not involve a dispute between the Indians and a State or its grantees. Indeed the dispute, which was between the United States against a trespasser, took place before Alaska was admitted to the Union. The equal footing doctrine was not in issue. In essence, the United States was protecting the rights of the future State of Alaska as well as those of the Indians. (See the Court of Appeals decision which was affirmed by this Court in *Alaska Pacific Fisheries, supra. Alaska Pacific Fisheries v. United States* (1917) 240 Fed. 274.) This fact makes the *Alaska Pacific Fisheries* decision consistent with, not contrary to, the *Montana v. United States* and *United States v. Holt State Bank* cases. The beds of navigable waters are held in trust by the United States for future states. In this case the eastern half of the Colorado Riverbed was held in trust for Arizona.

C. The Petitioner's Arguments Concerning Aboriginal Title Are Premature And Should Be Decided By The District Court On Remand.

The bulk of the petition for writ of certiorari in this case is apparently designed to establish the Tribes' aboriginal title to the riverbed. This argument is premature. The Court of Appeals recognized that there was no evidence in the record concerning aboriginal title to the eastern half of the riverbed. (*United States v. Aranson, supra,* at p. 666.) Consequently, the Court of Appeals remanded this issue so all parties would have an opportunity to address it.

There is no point in this Court rendering a decision before these issues are considered by the District Court on remand and the record is complete. This is a case where it is "desirable to wait and see," and where it is therefore and appropriate to refuse a grant of certiorari. (See *Darr v. Burford* (1950), 339 U. S. 200, 227 (Frankfurter, dissenting.)

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: September 19, 1983.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of the
State of California

N. GREGORY TAYLOR
Assistant Attorney General

By: KENNETH R. WILLIAMS
(Counsel of Record)
Deputy Attorney General

Counsel for Respondent
State of California

No. 83-233

Office-Supreme Court, U.S.
FILED
OCT 17 1983
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

COLORADO RIVER INDIAN TRIBES,
Petitioner,

vs.

GERALD ARANSON, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Of Counsel:
JO LYNN LAMBERT
WASHBURN & KEMP
One Embarcadero Center
Suite 2407
San Francisco, CA 94111

ROY H. MANN
CLAYSON, MANN, AREND
& YEAGER
601 South Main Street
Corona, CA 91720
Counsel for Palo Verde Irrigation District

GUIDO R. SMITH
Attorney at Law
Imperial Bank Building
Tenth Floor
695 Town Center
Costa Mesa, CA 92626

EDGAR B. WASHBURN
One Embarcadero Center
Suite 2407
San Francisco, CA 94111
Telephone: (415) 981-2121
Counsel of Record for Respondents Travis, John & Palo Verde Irrigation District

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Did the Court of Appeals correctly conclude that intermittent tribal use of Colorado River waters together with the presence of the river within the outer boundaries of the Colorado River Indian Reservation were circumstances insufficient to prove a "clear and unequivocal" intent by the United States to convey the riverbed to the Indians and thereby deprive the future State of Arizona of its equal footing rights?

TABLE OF CONTENTS

	Page
Question presented	i
Opinion below	1
Jurisdiction	1
Statutory provisions involved	2
Statement of the case	3
Reasons for denying the writ	9
I. This case is not procedurally ripe for Supreme Court review	9
A. Arizona was an omitted indispensable party before the trial court	9
B. The tribe's claim of aboriginal title to the disputed lands has yet to be tried	10
II. The Court of Appeals correctly applied Montana v. United States, 450 U.S. 544 (1981), to the facts presented here	12
III. Petitioner is asking this court to reconsider its recent decision in Montana v. United States, 450 U.S. 544 (1981), an invitation this court should not accept	16
Conclusion	17

TABLE OF AUTHORITIES CITED

Cases

Page

Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) 13, 14, 16

American Construction Co. v. Jacksonville, T. & K. R. Co., 148 U.S. 372 (1893) 11

Arizona v. California, 51 U.S.L.W. 4325 (U.S. Mar. 30, 1983) (No. 8 Orig.) 15

Arizona v. California, 373 U.S. 546 (1963) 15

Arizona v. California, 376 U.S. 340 (1964) 15

Arizona v. California, 439 U.S. 419 (1979) 15

Barker v. Harvey, 181 U.S. 481 (1901) 10

Borax Consolidated v. City of Los Angeles, 296 U.S. 10 (1935) 5

Brotherhood of Locomotive Firemen v. Bangor & Aroostook R. R., 389 U.S. 327 (1967) 11

California v. Arizona, 440 U.S. 59 (1979) 10

Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) 13, 14, 16

Fouke v. Schenewerk, 197 F.2d 234 (5th Cir. 1952) 10

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1915) 11

Heath v. Wallace, 138 U.S. 573 (1891) 4

Houston Oil Co. v. Goodrich, 245 U.S. 440 (1917) 13

McShan v. Sherrill, 283 F.2d 462 (9th Cir. 1960) 10

Mohave Indians Who Are Members of the Colorado River Indian Tribes v. United States, 31 Ind. Cl. Comm. 425 (1973) 11

Montana v. United States, 450 U.S. 544 (1981) 9, 12, 14, 16, 17

Table of Authorities Cited

Cases

	Page
Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1971)	5
People v. California Fish Co., 166 Cal. 576 (1913)	15
Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845)	5, 17
Puyallup Indian Tribe v. Port of Tacoma, No. 81-3480, August 15, 1983	10
San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1980)	11
Shively v. Bowlby, 152 U.S. 1 (1894)	17
State v. Superior Court (Fogerty), 29 Cal.3d 240, 172 Cal.Rptr. 713, *cert. denied*, 454 U.S. 865 (1981	15
State v. Superior Court (Lyon), 29 Cal.3d 210, 625 P. 2d 239, 172 Cal.Rptr. 696, *cert. denied*, 454 U.S. 865 (1981)	15
Stewart v. United States, 242 F.2d 49 (5th Cir. 1957)	10
Tewa Tesuque v. Morton, 498 F.2d 240 (10th Cir., 1974)	10
United States v. Aranson, 696 F.2d 654 (1983)	9
United States v. Johnson, 268 U.S. 220 (1924)	13
U.S. v. Title Insurance and Trust Co., 265 U.S. 472 (1924)	10
Winters v. United States, 207 U.S. 564 (1908)	15
Wright v. Rosenberry, 121 U.S. 488 (1877)	4

TABLE OF AUTHORITIES CITED

Rules

	Page
United States Supreme Court Rules, Rule 17	13

Statutes

Act of Admission of the State of California, 9 Stat. 452 (1850)	2, 4, 5
Act of March 3, 1865, 13 Stat. 541, 559	2, 3, 5
Act of March 2, 1867, ch. 173, 14 Stat. 492	5
Act of July 27, 1868, ch. 248, 15 Stat. 198	5
Act of May 29, 1872, ch. 233, 17 Stat. 165	5
California Land Claims Act, ch. 41, 9 Stat. 631 (1851)	10
Clean Water Act of 1977, 33 U.S.C. §§ 1251-1376	15
Harbors Appropriations Act of 1899, 33 U.S.C. §§ 401-466	15
Proclamation of Arizona Statehood, 37 Stat. 1728 (1912)	3
Swamp Land Act, ch. 84, 9 Stat. 519 (1850) (codified as amended at 43 U.S.C. §§ 981-994)	4
United States Code:	
28 U.S.C. Section 1254(1)	1, 11
28 U.S.C. Section 1257	11

Texts

1 C. Kappler, Indian Affairs Laws and Treaties 803 (2d ed. 1904)	6
3A J. Moore and J. Lucas, Moore's Federal Practice ¶ 19.09[1] 19-198 - 19-200 (1982)	10

Treaties

Treaty of New Echota, December 29, 1835, 7 Stat. 478	14
Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333-34	14

Other Authorities

Page

Memorial of the [Territorial] Legislature of Arizona, H.R. Misc. Doc. No. 16, 38th Cong., 2d Sess. (1865) .. 4

1864 Annual Report of the Commissioner of Indian Affairs, H.R. Exec. Doc. No. 1, 38th Cong., 2d Sess. 147 (U.S. Serial Set Vol. No. 1200) 3, 4, 5

1866 Annual Report of the Commissioner of Indian Affairs, H.R. Exec. Doc. No. 1, 39th Cong., 2d Sess. 1, 108 (U.S. Serial Set Vol. No. 1284) 3

1870 Annual Report of the Commissioner of Indian Affairs, H.R. Exec. Doc. No. 1, Part 4, 41st Cong., 3d Sess. 467, 594 (U.S. Serial Set Vol. No. 1449) 4

1871 Annual Report of the Commissioner of Indian Affairs, H.R. Exec. Doc. No. 1, 42d Cong., 2d Sess. 417, 766 (U.S. Serial Set. Vol. No. 1505) 6

1872 Annual Report of the Commissioner of Indian Affairs, H.R. Exec. Doc. 1, Part 5, 42d Cong., 3d Sess. 391, 470 (U.S. Serial Set Vol. No. 1560) 4

1873 Annual Report of the Commissioner of Indian Affairs, H.R. Exec. Doc. No. 1, Part 5, 43d Cong., 1st Sess. 371, 652 (U.S. Serial Set Vol. No. 1601) 4

1879 Annual Report of the Commissioner of Indian Affairs, H.R. Exec. Doc. No. 1, 46th Cong., 2d Sess. 69, 109 (U.S. Serial Set Vol. No. 1910) 7

1882 Annual Report of the Commissioner of Indian Affairs, H.R. Exec. Doc. No. 1, 47th Cong., 2d Sess. 1, 61 (U.S. Serial Set Vol. No. 2100) 4

1885 Annual Report of the Commissioner of Indian Affairs, H.R. Exec. Doc. No. 1, 49th Cong., 1st Sess. 3, 227 (U.S. Serial Set Vol. No. 2379) 7

No. 83-233

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

COLORADO RIVER INDIAN TRIBES,
Petitioner,

vs.

GERALD ARANSON, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondents Travis, John and Palo Verde Irrigation District[1] hereby submit their brief in opposition to the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 696 F.2d 654 (1983).

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. section 1254(1).

---

[1]These Respondent groups include: Gerald Aranson and Jan Furst Aranson, his wife; Blythe Land Properties, a Limited Partnership; Joe B. Finley, individually and as President of Western Cattle Feeders, and Florence S. Finley, his wife; Murray M. Hausner and Leonore Hausner, his wife; Jared C. John, Jr., and Alice

STATUTORY PROVISIONS INVOLVED

Act of Admission of the State of California, 9 Stat. 452 (1850):

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of California shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.

Act of March 3, 1865, 13 Stat. 541, 559:

> All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, contain-

---

B. John, his wife; Edward Meltzer and Frieda A. Meltzer, his wife; Arthur Ourieff and Verni Ourieff, his wife; Jack M. Ostrow; Prima Rosa Land and Cattle Company, A Partnership; Arthur I. Berman; Martin A. Levy; Western Cattle Feeders, a California corporation; Rancho Del Juan, Inc., an Arizona corporation; Neil John, individually and as President of Rancho Del Juan, Inc.; C. P. Richins and Sons, a Partnership; Charles P. Richins, Jr. and Agnes Richins, his wife; Norman E. Richins and Winifred Richins, his wife; Lawrence D. Richins, individually and as President of Sunrise Farms and as President of Riverview Farm and Tillage Company, and Barbara Richins, his wife; Riverview Farm and Cattle Company, a Partnership; Arnold M. Travis and Joan D. Travis, his wife; Riverview Land Company, a California corporation; C. P. Richins, individually and as President of Riverview Land Company; Sunrise Farms, a California corporation; Harry B. Swerdlow; Travis Farms, a Partnership; Joe B. Finley, Jr. and Mary C. Finley, his wife; R. W. Bilbo and Kathryn S. Bilbo, his wife; Arizona Farmers Production Credit Association; Bank of America National Trust and Savings Association; Desert Ginning Company, Inc., an Arizona corporation; Blythe Feed Yards, a Partnership; The Federal Land Bank of Berkeley; Riverview Farm and Tillage Company, a California corporation; Northwestern Mutual Life Insurance Company; Los Angeles Period Furniture Company, Inc.; and Julius Fligelman, individually and as President of Los Angeles Period Furniture Company, Inc.

ing about seventy-five thousand acres of land shall be set apart for an Indian reservation for the Indians of said river and its tributaries.

Proclamation of Arizona Statehood, 37 Stat. 1728 (1912):

NOW THEREFORE, I, WILLIAM HOWARD TAFT, President of the United States of America, . . . declare and proclaim the fact that the fundamental conditions imposed by Congress on the State of Arizona to entitle that State to admission have been ratified and accepted, and that the admission of the State into the Union on an equal footing with the other States is now complete.

STATEMENT OF THE CASE

In 1865, Congress established the Colorado River Indian Reservation by setting aside "all that part of the public domain in the territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River . . . ." Act of March 3, 1865, 13 Stat. 541, 559. The reservation was created from a portion of the periodically flooded "bottom land"[2] bounding the eastern bank of the

[2] "Bottom land" refers to lands bordering the Colorado River which are periodically flooded. It does not include the bed of the river. For example, the 1864 Annual Report of the Commissioner of Indian Affairs (hereinafter referred to as Annual Report for the year designated), H.R. Exec. Doc. No. 1, 38th Cong., 2d Sess. 147 (U.S. Serial Set Vol. No. 1220) (incorporating the report of Adophus F. Waldemar, May 30, 1864) states:

> "At your request I have made an examination of the lands on the east bank of the Colorado River from La Paz to Corner Rock.
>
> I have been surprised at the great quantity of rich bottom land and alluvial soil, transversed by many sloughs and lagunas, which extend from the banks of the river for several miles into the valley."

Id. at 303. See also 1866 Annual Report, H.R. Exec. Doc. No. 1, 39th Cong., 2d Sess. 1, 108 (U.S. Serial Set Vol. No. 1284) ("cattle . . . are now being grazed on the Colorado bottoms"); *id.* at 111 ("flooding all the bottom lands on either side of the river"); 1870

Colorado River. The bottom land on the western bank of the river, part of which was sold to respondents' predecessors in interest by the State of California in the 1870's, was swamp and overflowed land which belonged to the State of California.[3]

Although the 1865 Act neither mentions the riverbed nor specifies the exact location of the western boundary of the reservation, little doubt exists that the boundary was the eastern bank of the Colorado River.[4] The western half of the riverbed was already owned by California under the equal footing doctrine.[5] Moreover, the "public domain" from which the reservation was created did not include

---

Annual Report, H.R. Exec. Doc. No. 1, Part 4, 41st Cong., 3d Sess. 467, 594 (U.S. Serial Set Vol. No. 1449) ("bottom land along the river"); 1882 Annual Report, H.R. Exec. Doc. No. 1, 47th Cong., 2d Sess. 1, 61 (U.S. Serial Set Vol. No. 2100) ("the bottom land on either side of said river").

[3]The United States granted California all swamp and overflowed lands within the State as of September 28, 1850. Swamp Land Act, ch. 84, 9 Stat. 519 (1850) (codified as amended at 43 U.S.C. §§ 981-994); *Wright v. Rosenberry*, 121 U.S. 488 (1877); *Heath v. Wallace*, 138 U.S. 573 (1891). California could convey the lands into private ownership as of September 28, 1850, because the Act was considered a present grant of lands. *Wright v. Rosenberry*, 121 U.S. at 488.

[4]The legislative history and the Reports of the Commissioners of Indian Affairs during that period indicate that the reservation was to be located on the banks of the Colorado River. Debate on Act of March 3, 1865, *supra* note 2, at 321 ("they will have a resting-place and a home on the banks of the river"); 1864 Annual Report, *supra* note 2, at 301 ("on the bank of the Colorado river"); 1873 Annual Report, H.R. Exec. Doc. No. 1, Part 5, 43rd Cong., 1st Sess. 371, 652 ("all the bottom-land between the river and the edge of the mesa"). See also 1864 Annual Report, *supra* note 2, at 303; 1866 Annual Report, *supra* note 2, at 109; 1870 Annual Report, *supra* note 2, at 592. Memorial of the [Territorial] Legislature of Arizona, H. R. Misc. Doc. No. 16, 38th Cong., 2d Sess. (1865).

[5]When California acquired statehood, it received the western half of the bed of the Colorado River under the equal footing doctrine. Act of Admission of the State of California, ch. 50, 9 Stat. 452

the bed of the navigable Colorado River. ***Borax Consolidated v. City of Los Angeles***, 296 U.S. 10, 17 (1935).

Congress established the reservation in an attempt to eliminate the frequent crop failures suffered by the Indians when the Colorado River failed to flood its banks.[6] Historically, the Indians residing on the "bottom lands" bordering the river had relied upon the river overflows as the source of water for their crops in much the same way that the Egyptians used the annual flooding of the Nile, that is, by planting crops in the floodplain following the recession of the annual floods of the river.[7] Overflows were unreliable, however, and crop failures occurred during the frequent periods of drought. Thus, when Congress created the reservation in 1865, it appropriated funds to finance construction of an irrigation canal which was to provide water on a more regular basis.[8]

(1850); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1971).

[6]The 1864 Commissioner of Indian Affairs recommended that Congress:

> "select a reservation for them on the bank of the Colorado River, and ask the government to aid them in opening an irrigating canal, so that they may become industrious and self-sustaining."

1864 Annual Report, *supra* note 2, at 301. *Accord,* Debate on Act of March 3, 1865, *supra* note 2, at 1320-1322.

[7]1864 Annual Report, *supra* note 2, at 295. Contrary to petitioner's suggestion that the Tribes employed irrigation for crop production prior to creation of the reservation, the Indians did not rely upon irrigation through artificial diversion of Colorado River water, but rather, depended upon the natural periodic flooding of the "bottom lands."

[8]Act of March 2, 1867, ch. 173, 14 Stat. 492; Act of July 27, 1868, ch. 248, 15 Stat. 198; Act of May 29, 1872, ch. 233, 17 Stat. 165.

Intrusion of squatters onto reservation lands and concern that the "bottom lands" originally included within the reservation were insufficient to provide crops adequate to support the Indians[9] led President Grant to expand the reservation by three executive orders in 1873,[10] 1874,[11] and 1876.[12] The third order extended the western boundary of the reservation into California north of the land now owned by respondents. With respect to the lands involved here, the Executive Order described the west boundary as "the west bank of the Colorado River." Although petitioner pins its case on this language, the order could not have been intended as a grant of any portion of the riverbed. By 1876, the west half of the riverbed from the center line to the western bank had been vested in the State of California for more than 25 years. The reports of the Commissioners

---

[9]1871 Annual Report, H. R. Exec. Doc. No. 1, 42d Cong., 2d Sess. 417, 766 (U.S. Serial Set. Vol. No. 1505); 1873 Annual Report, *supra* note 4, at 652.

[10]Executive Order of November 22, 1873, *reprinted in* 1 C. Kappler, *Indian Affairs Laws and Treaties* 803 (2d ed. 1904).

[11]Executive Order of November 16, 1874, *reprinted* in Kappler, *supra* note 11. The second expansion added, for the first time, lands in the State of California on the western side of the Colorado River but in no way suggested that the riverbed was to be included in the reservation.

> Beginning at a point where the La Paz Arroyo enters the Colorado River, four miles above Ehrenberg . . . thence in a northwesterly direction across the Colorado River to the top of Monument Peak, in the State of California; thence south westerly in a straight line to the top of Riverside Mountain, California; thence in a southeasterly direction to the point of beginning, be, and the same is hereby, withdrawn from sale and set apart as the reservation for the Indians of the Colorado River and its tributaries.

[12]Executive Order of May 15, 1876, *reprinted in* Kappler, *supra* note 11, at 804.

of Indian Affairs during the period that followed verify that the reservation included the "bottom land" along the *banks* of the river.[13]

Respondents' land is involved in this case because the bed of Colorado River moved to the west and split into two channels following completion of the Laguna Dam (located downstream from the Palo Verde Valley) in 1909. The result was to place the disputed property largely on the eastern or Arizona side of the river. The change in the river's location gave rise to petitioner's claim that the western boundary of the reservation (which petitioner contends included the bed of the river) moved westward with the river and encompassed the land purchased years earlier by respondents' predecessors in interest.

The river returned to its approximate historic location with construction of a cut-off channel by the Palo Verde Mutual Water Company (with the authority of the United States Department of the Interior) in 1920. Thus, when respondents purchased the land in dispute in 1939, the property was located west of the Colorado River well within California. The land was never occupied by the Indians and was never part of the reservation under any

---

[13]For example, the 1879 Annual Report describes the reservation as: "extend[ing] for 75 miles north and south, divided in the center by the Colorado River. . . ." H. R. Exec. Doc. No. 1, 46th Cong., 2d Sess. 69, 109 (U.S. Serial Set Vol. No. 1910). Likewise, the 1882 Annual Report notes that the reservation "embraces within its limits all, or nearly all, of the bottom land on *either side of the river*." 1882 Annual Report, *supra* note 2, at 61 (emphasis added). To the same effect is the 1885 Annual Report where the reservation is described as: "contain[ing] 128,000 acres of land, situated principally on the east side of the Colorado River, *extending along its banks* from a short distance below La Paz to a point nearly opposite Monument Peak, California, a distance of about 70 miles." H. R. Exec. Doc. No. 1, 49th Cong., 1st Sess. 3, 227 (U.S. Serial Set Vol. No. 2379) (emphasis added).

theory except that, due to a temporary shift in the river channel, the land was located east of the river for some time between 1909 and 1920.

On July 17, 1972, after more than 100 years of silence, the Indians commenced this action (through the United States in its capacity as trustee for the tribe) seeking to quiet title to those lands situated on the California side of the present channel and east of the median line of the 1919 channel. The Indians sought to eject respondent record owners of the property together with the Palo Verde Irrigation District and the State of California. By the time petitioner commenced this action, respondents Travis and Johns had expended more than $2,000,000 purchasing and improving the lands at issue.

For reasons that are wholly unexplained, the State of Arizona was not named as a party and was not joined. This is all the more surprising since Arizona's claim to the riverbed is substantial.

On February 11, 1977, following a six-day court trial, the district court entered a judgment quieting title to all lands east of the midline of the 1919 channel in the United States as owner in trust for the Colorado River Indian Tribes. In addition, the district court quieted title to the the western half of the 1919 channel in California, ejected respondents from the lands in question, and assessed respondents back rent for their use of the property.[14]

Respondents appealed to the Ninth Circuit Court of Appeals, citing, *inter alia*, error in determining that the Indians received title to the eastern half of the riverbed. California did not appeal and the judgment of the trial

---

[14]The court did off-set the value of good-faith improvements against back rent.

court has become final as to the State of California.[11] The Court of Appeals affirmed the district court in a decision issued on March 30, 1981. That decision failed to consider *Montana v. United States*, 450 U.S. 544 (1981), decided by this Court six days earlier. Upon respondents' petition for reconsideration, the Court of Appeals withdrew its decision and ordered rebriefing and additional oral argument on the *Montana* issue. The State of Arizona appeared for the first time in all of these proceedings in July, 1981, when it intervened shortly before the reargument of the case following withdrawal of the original decision.

On January 10, 1983, the Court of Appeals issued the decision from which the petitioner seeks review. *United States v. Aranson*, 696 F.2d 654 (1983). The 1983 Opinion reversed the district court and held that the evidence was insufficient to establish that the government had intended to convey the eastern half of the riverbed to the Indians when it formed the reservation. *Id.* at 666. The Court of Appeals remanded the matter for retrial on the issues of the "aboriginal title and the correct boundary of the reservation." *Id.* The aboriginal title issue was raised for the first time by the Indians during supplemental briefing following withdrawal of the original decision.

REASONS FOR DENYING THE WRIT

I. This Case Is Not Procedurally Ripe for Supreme Court Review

A. Arizona Was an Omitted Indispensable Party Before the Trial Court

This case is not ripe for review. Petitioner is seeking to quiet title to the bed of the Colorado River. The State of

---

[11] California's status in the case is unusual. That state was awarded the western half of the 1919 channel by the district court (upon a judgment stipulated to by the United States). Neither the petitioner nor California appealed, and therefore, that judgment is presumably final. In it's petition, however, petitioner seems to be asserting aboriginal title to the entire riverbed, including California's half.

Arizona is a competing claimant because of the presumption that it took title to the east half of the riverbed upon its admission to the Union in 1912. Despite its interest in the property, Arizona was not a party to the proceedings in the trial court, and only belatedly appeared in the appellate proceedings. Petitioner is asking this Court to divest Arizona of sovereign claims based upon a trial record of proceedings in which Arizona was neither a party nor a participant.

Arizona's claim makes it, without question, an indispensable party in this litigation. *California v. Arizona*, 440 U.S. 59, 62 (1979).[16] Until Arizona has had an opportunity to litigate its interests, this cause is not ripe.

B. The Tribes' Claim of Aboriginal Title to the Disputed Lands Has Yet to Be Tried

The Court of Appeals remanded this case to the district court for further proceedings on an issue which Petitioner raised for the first time on appeal. That issue is whether the tribes enjoy any aboriginal title to the disputed lands. 696 F.2d at 666. While respondents maintain there is no merit to the aboriginal-title claim,[17] nevertheless its rais-

---

[16]See also *McShan v. Sherrill*, 283 F.2d 462 (9th Cir. 1960); *Stewart v. United States*, 242 F.2d 49 (5th Cir. 1957); *Fouke v. Schenewerk*, 197 F.2d 234 (5th Cir. 1952); *Tewa Tesuque v. Morton*, 498 F.2d 240 (10th Cir., 1974); 3A J. Moore and J. Lucas, *Moore's Federal Practice* ¶ 19.09[1] 19-198-19-200 (1982).

The recent Ninth Circuit decision in *Puyallup Indian Tribe v. Port of Tacoma*, No. 81-3480, August 15, 1983, is at odds with earlier decisions of the same circuit concerning indispensability of party claimants to real property and, in respondent's view, is in error.

[17]Any claim to land in California based upon aboriginal title was extinguished in 1853 under the California Land Claims Act, ch. 41, 9 Stat. 631 (1851), which required that claims be presented by March 3, 1853. *Barker v. Harvey*, 181 U.S. 481 (1901); *U.S. v. Title*

ing—and the remand for proceedings on the question—demonstrate that the case is tendered to this Court in a posture far from final. As a purely practical consideration, should petitioner prevail on its new theory of aboriginal title, its cause for seeking review here would be made moot. Too, as mentioned above, the State of Arizona is yet to be heard on its claim of title to the east half of the riverbed. This claim will likewise be adjudicated when the matter is heard by the district court.

"[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R. R.*, 389 U.S. 327, 328 (1967). A lack of finality such as inheres in the present case is "of itself . . . sufficient ground for the denial" of the petition for writ of certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1915). See also *American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893). *Cf.* the recent decision in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 633 (1980) (jurisdiction predicated on section 1257 of Title 28, United States Code, not on section 1254 (1)).

Insurance and Trust Co., 265 U.S. 472 (1924). Aboriginal title to land in Arizona and Nevada was extinguished on March 3, 1865, when the Colorado River Indian Reservation was created.

Petitioner has already litigated the issue of Mohave aboriginal title and has already been paid for its claims existing prior to the extinguishment dates. In *Mohave Indians Who Are Members of the Colorado River Indian Tribes v. United States*, 31 Ind. Cl. Comm. 425 (1973), the Indian Claims Commission entered a final judgment (based upon a compromise settlement between the tribes and the federal government) awarding compensation to the Indians according to the fair market value of the Mohave's aboriginal title lands in California as of the March 3, 1853 date of extinguishment, and in Arizona and Nevada as of the March 3, 1865 date of extinguishment.

II. The Court of Appeals Correctly Applied Montana v. United States, 450 U.S. 544 (1981), to the Facts Presented Here

The Court of Appeals found the proper resolution of this matter to be as elusive as the Colorado River itself with regard to the respective rights of the parties flowing from the many and varied physical movements of the river. Nevertheless, following this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), it had little difficulty correctly concluding that neither Congress nor the President, in creating and modifying the boundaries of the Colorado River Indian Reservation, manifested an intent to deprive Arizona of its sovereign right to the eastern half of the bed of the Colorado River.

Montana v. United States reaffirmed petitioner's need to prove that the U.S. government intended to convey the riverbed when it created the Indian reservation. Stressing the "strong presumption against conveyance by the United States," *Montana* held that the presumption cannot be overcome "unless the intention [of the United States to convey the riverbed] was definitely declared or otherwise made plain" or "was rendered in 'clear and special words.'" 450 U.S. 552. The mere fact that the bed of a navigable waterbody lies within the perimeter boundaries described in the treaty, legislation or executive order creating the reservation is not sufficient expression of intent. *Id.* at 554. The existence of a "public exigency" may be pertinent in ascertaining the intent of the United States, but the intent to convey the riverbed must still be clear and unequivocal. *Id.* at 554.

In applying the *Montana* analysis to the facts of this case (and in the absence of any findings by the district court on these questions), the Court of Appeals concluded that "even the strongest language in the various official documents defining the reservation's western boundary"

failed to manifest a specific intent to convey the riverbed. 696 F.2d at 664. The appellate court further found that the Indians' use of the river was not enough to justify inferring such intent on the part of the United States, and that the "considerable scholarly documentation"[15] submitted failed to indicate that sufficient "public exigency" existed at the time of the grant to compel Congress to depart from the equal footing doctrine. 696 F.2d at 666.

Petitioner's quarrel with the decision of the Court of Appeals is primarily a disagreement with the factual determinations of that court. Naturally, petitioner would like this Court to review the evidence and resolve the facts another way. However, this Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1924). An examination of factual issues (even if we are to assume that there was such evidence before the Court of Appeals which could be examined) is not an appropriate task for this Court. *See* Sup. Ct. R. 17; *Houston Oil Co. v. Goodrich*, 245 U.S. 440 (1917) (holding that a writ of certiorari was improvidently granted because the issue "depended essentially upon an appreciation of the evidence").

In any event, nothing concerning the creation of the Colorado River Indian Reservation approaches the unusual circumstances in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), and *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), where an intent to convey the beds of navigable waterways was found. In *Choctaw Nation*, the Choctaw and Cherokee Indians had been forced to move from Georgia and Mississippi to Arkansas Territory, and then again to what is now Oklahoma, in order to make way for American settlers. Certain Indians refused to move

---

[15]None of the so-called "scholarly documentation" was ever offered as evidence at trial, but was submitted for the first time by petitioner during reargument before the Ninth Circuit.

voluntarily and the U.S. Army had to be brought in to forcibly remove them. Peace was maintained only upon assurances by the government that the Indians would have complete sovereignty over their new lands and that "no part of the land granted to them shall ever be embraced in any territory or State." Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333-34; Treaty of New Echota, December 29, 1835, 7 Stat. 478. In light of this history, and of the plainness of the government's covenant, this Court found that the government intended to convey the bed of the river to the Indians and not to reserve it for the future state. 397 U.S. at 635.

No similar covenant was made with the Indians of the Colorado River; they were neither forced from their native lands nor compelled to settle on the reservation. Moreover, unlike the tribes in *Choctaw*, the Colorado River Indian Tribes received only the customary right of use and occupancy[19] rather than the far stronger ownership interest of an entire region in fee simple. 397 U.S. at 626, 638. Petitioner's reliance on *Choctaw Nation* ignores these fatal distinctions. *See Montana*, 450 U.S. 555, n. 5 (discussing the peculiar circumstances justifying the *Choctaw* decision).

Likewise, the decision in *Alaska Pacific Fisheries* was based upon facts wholly unparrallel to those in the present case. The Metlakahtla Indians, who had historically depended upon fishing for their survival, emigrated from their homeland to the Annette Islands at the urging of the U.S. government. Congress then established a reservation for them, which comprised the Annette Islands and the navigable waters between the islands. Following their removal to the Annettes, they not only continued to fish but also developed a commercial fishery upon which they grew dependent. Alaska Pacific Fisheries thereafter erected a

---

[19]1872 Annual Report, H.R. Exec. Doc. 1, Part 5, 42d Cong., 3d Sess. 391, 470 (U.S. Serial Set Vol. No. 1560).

massive fish trap in reservation waters which was so effective that it materially reduced the catch available to the Indians. In this action to remove the fish trap, the question presented was the status of the waters and submerged land. This Court observed that ownership of the fishing grounds adjacent to the islands was essential to the Indians' survival, that Congress was fully aware of this fact when it created the reservation, and that Congress had thus clearly intended the reservation to include the fisheries. 248 U.S. at 98.

By contrast, ownership of the riverbed was never essential to the survival of the Colorado River Indian Tribes. Primarily an agricultural people, the tribes were dependent on the river as a source of flood water for their crops and an occasional source of fish to supplement their diet. Under the Winters Doctrine established by this court in 1908,[20] and subsequent litigation,[21] the Indians have been assured of sufficient water for irrigation. Their ability to fish is similarly guaranteed.[22] The Indians' right to fish and

[20] *Winters v. United States*, 207 U.S. 564 (1908).

[21] This Court in *Arizona v. California*, 373 U.S. 546 (1963), and in subsequent decisions relative to that same litigation (*Arizona v. California*, 376 U.S. 340 (1964); *Arizona v. California*, 439 U.S. 419 (1979); *Arizona v. California*, 51 U.S.L.W. 4325 (U.S. Mar. 30, 1983) (No. 8 Orig.)) has guaranteed petitioner tribes water for irrigation and other purposes associated with the Colorado River Indian Reservation. Likewise, the continued regulatory authority of Congress over the navigable Colorado River under the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 401-466, and the Clean Water Act of 1977, 33 U.S.C. §§ 1251-1376, assures the Indians access to the river and use of the river waters for boating, fishing, bathing and a host of other purposes. The same rights are likewise guaranteed through the public trust doctrine which, as a matter of state law, provides the public with extensive use of navigable waters. (*See People v. California Fish Co.*, 166 Cal. 576, 138 p. 79 (1913); *State v. Superior Court* (*Lyon*), 29 Cal.3d 210, 625 p. 2d 239, 172 Cal.Rptr. 696, *cert. denied*, 454 U.S. 865 (1981); *State v. Superior Court* (*Fogerty*), 29 Cal.3d 240, 625 p. 2d 256, 172 Cal.Rptr. 713, *cert. denied*, 454 U.S. 865 (1981).

[22] *Id.*

irrigate is not the least bit diminished because the bed of the river may be the sovereign land of either California or Arizona. Surely, petitioner is not suggesting that it could not take water or fish from the west half of the river because it became the sovereign land of California in 1850. That would be an absurdity. The Indians used the west half of the river just as extensively as the east half—if they used either at all—and their ability to do so had nothing to do with ownership of the riverbed. The Court of Appeals correctly concluded that the facts surrounding the creation of the reservation did not rise to the level of the unique circumstances present in *Choctaw Nation* and *Alaska Pacific Fisheries*.

III. Petitioner Is Asking This Court to Reconsider Its Recent Decision in Montana v. United States, 450 U.S. 544 (1981), an Invitation This Court Should Not Accept

Stripped of its surplusage, petitioner argues that when a reservation is created which incorporates a navigable waterbody within its perimeter boundaries and when water from the waterway has been used by the Indians, the reservation will include the bed of the navigable waterway. This result would have the effect of placing most—if not all—navigable waters within reservation boundaries in the ownership of the tribes, thereby rendering *Montana*, and the long line of authorities of which it is only the most recent example, a nullity.

If use of the Colorado River water and the existence of fish as a part of the diet is sufficient to establish the intent of United States to deprive a state of its sovereign lands, there is not a navigable stream or lake in the west that was not conveyed as a part of any reservation in which they may be found. It is difficult to conceive of a situation in the arid portions of this country where use of river water for domestic purposes, crop raising or fishing would not be

present. Nor, for that matter, is it unusual that a tribe would settle near a large waterbody such as the Colorado River. On the contrary, it would be surprising if they settled anywhere else.

Montana v. United States is representative of principles that this Court has consistently recognized since it first affirmed, in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845), that the beds of navigable waterbodies are held in trust by the United States for future states and that, upon admission into the Union, the beds become sovereign lands of the states. As noted in *Shively v. Bowlby*, 152 US. 1 (1894), this trust obligation is not easily defeated. To depart from these well-recognized principles, as petitioner now urges, and to change the rules decades or even centuries after the fact—thereby divesting the states and the states' successors in interest of lands long since considered to be sovereign—is unwarranted and unnecessary.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

October 14, 1983

Respectfully submitted.

EDGAR B. WASHBURN
Counsel of Record for Respondents Travis, John & Palo Verde Irrigation District

Office - Supreme Court, U.S.
FILED
OCT 24 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-233

In the Supreme Court of the United States

OCTOBER TERM, 1983

COLORADO RIVER INDIAN TRIBES, PETITIONER

v.

GERALD ARANSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Alaska Pacific Fisheries v. *United States*, 248 U.S. 78 ..... 4, 5

Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 5

Hamilton-Brown Shoe Co. v. *Wolf Brothers & Co.*, 240 U.S. 251 5

Montana v. *United States*, 450 U.S. 544 ..... 3, 4, 5, 6

Statutes:

Act of Mar. 3, 1865, ch. 127, 13 Stat. 541 *et seq.* 1

13 Stat. 559 1

Miscellaneous:

1 Kappler, *Indian Affairs* 803 (1904):

Exec. Order of Nov. 22, 1873 1

Exec. Order of Nov. 16, 1874 1

Exec. Order of May 15, 1876 2

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-233

COLORADO RIVER INDIAN TRIBES, PETITIONER

v.

GERALD ARANSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

1. The Colorado River Indian Reservation was originally established by the Act of Mar. 3, 1865, ch. 127, 13 Stat. 541. This Act set aside for the Indians of the Colorado River "all that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River * * *" (Act of Mar. 3, 1865, ch. 127, 13 Stat. 559). An Executive Order of Nov. 22, 1873, added another portion of the Arizona Territory to the Reservation, describing the added portion as "bounded on the west by the Colorado River, and east by mountains and mesas." 1 Kappler, *Indian Affairs* 803 (1904). The Executive Order of Nov. 16, 1874, extended the reservation for the first time into California. *Ibid.* The southwestern boundary of the Reservation was described in this order as a line running from Riverside Mountain in California, " in a southeasterly direction to the point of

beginning," which was a point on the east bank of the river about four miles above Ehrenberg, Arizona. The description of the western boundary was clarified by an Executive Order issued on May 15, 1876, so that the boundary would run from Riverside Mountain " in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; thence to the place of beginning." *Id.* at 803-804.

This litigation involves approximately 1,912 acres of land along the western boundary of the Reservation. Between 1912 and 1919, the Colorado River in this portion of the Reservation slowly moved in a westerly direction until it formed a large loop (Pet. Supp. App. A58). In 1920, the Palo Verde Mutual Water Company constructed a cut-off channel across the neck of the loop (*id.* at A59). By 1921, the entire river was flowing through the cut-off, and thereafter the river never returned to its former channel (*ibid.*).

2. In 1972, the United States, as trustee for petitioners, brought this action in the United States District Court for the Central District of California to quiet title to the 1,912 acres lying between the left bank of the present day Colorado River and the center line of the channel of the river as it existed immediately prior to the avulsive change in the channel that occurred in 1920. The United States alleged that this land was part of the Colorado River Indian Reservation, and it sought to eject and recover damages from the respondent non-Indian farmers who were in possession.

After a trial, the district court found that the Executive Order of May 15, 1876, purported to include within the Reservation the entire bed of the Colorado River (Pet. Supp. App. A57). Because California had obtained title to the western half of the riverbed upon its admission to the Union in 1850, however, the Executive Order was found effective to reserve only the eastern half of the bed to the petitioners (*ibid.*).

The district court also found that the portion of the Colorado River bed in question had moved in a westerly direction until 1919 by a process of erosion and accretion and that the cutting of the channel in 1920 had caused an avulsive change in the course of the river (Pet. App. A58-A59). Thus, the land to the east of the median line of the original river bed still belonged to the Reservation, and the non-Indians who had entered onto the land in the 1930's and who had farmed it since then were wrongful occupiers (*id.* at A60). Title to the western half of the pre-1920 riverbed was awarded to California; title to the eastern half of the bed and the land between that bed and the present river was awarded to the United States in trust for petitioner (*ibid.*). The United States was also awarded damages against some of the landowners for the fair rental value of the lands (*id.* at A61).

The landowners appealed, contending that the district court erroneously applied federal, rather than state, law to the accretion/avulsion issue and that it had erred in its determination of the riverbed ownership issue. The court of appeals issued an opinion on March 30, 1981, affirming the district court's judgment (Pet. App. A1-A24). The court held that, while California law should have provided the rule of decision on the accretion/avulsion issue, state law would not have led to a different result than the federal law applied by the district court (Pet. App. A5-A9). Unaware of this Court's decision six days earlier in *Montana* v. *United States*, 450 U.S. 544 (1981), the court upheld the vesting of the eastern half of the riverbed in the United States in light of the language of the relevant executive orders (*id.* at A9-A18). Judge Sneed dissented from the holding on ownership of the riverbed (*id.* at A18-A24).

On April 17, 1981, the court of appeals withdrew its opinion and requested further briefing concerning the impact of the *Montana* decision. Shortly thereafter,

petitioners and the State of Arizona intervened. Petitioners in their brief claimed rights to the former riverbed based upon aboriginal use and occupancy, an argument not previously raised by the United States.

3. The court of appeals issued a new decision on January 10, 1983. The court retained that portion of its previous opinion that had addressed the accretion/avulsion issue (Pet. App. A25-A42), but it held that *Montana* compelled rejection of petitioners' claim to the eastern half of the riverbed. The court explained that the relevant executive orders were not sufficiently specific to convey the bed of the river under the standards set forth in *Montana* (*id.* at A44-A45). The court added that, regardless of the specificity of the conveyance documents, an intent to convey the riverbed could be implied where there is a showing that the Indians depended heavily on the particular body of water (*id.* at A46-A48), citing *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918). In this case, however, the Court concluded that the record did not show "that the Indians were so dependent on the river that Congress would have intended to depart from the equal footing doctrine and convey the river bed" (Pet. App. A48). The court of appeals therefore remanded the case to the district court with instructions to determine "the correct boundary of the Reservation" and to determine the issue of aboriginal title that had been raised by petitioner for the first time on appeal (*id.* at A49).

4. This petition addresses two of the grounds under which petitioners claim that they are entitled to the inclusion of the eastern half of the Colorado River bed in the Reservation. A third ground, petitioners' claim of aboriginal title, has not yet been considered by any court, and the district court has been directed to consider it on remand. If the Tribes succeed in establishing aborignal title, they will receive the full measure of relief presently denied to them by

the decision below, and further review of the questions presented here would be superfluous. Moreover, the court of appeals also left to the district court on remand the determination of the exact boundary of the Reservation, which requires a determination of the width of the river at the time of the conveyance to petitioners. Because even under the decision below, petitioner retains title to lands located east of the former riverbed, resolution of this issue will clarify the extent to which the court of appeals' ruling on the questions presented here affects the size of the Reservation.

In light of the existence of these significant unresolved issues, granting certiorari at this interlocutory stage would be a departure from the normal practice of this Court. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967). The issues presented here, as well as the issues to be determined on remand, will all be available for review by this Court when a final judgment has been entered disposing of all of the issues in the case. See *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-259 (1916).

The court of appeals held that the relevant statute and executive orders conveying the Reservation to petitioners did not convey the riverbed with sufficient specificity to satisfy the standards of *Montana* v. *United States*, 450 U.S. 544 (1981). Petitioners contend (Pet. 7-8), that the 1876 executive order involved here, in specifying the boundary of the Reservation as the *western* shore of the river, is sufficiently specific to meet the standards of *Montana*. The court of appeals also held that the Colorado River Indians were not so dependent on the river as to warrant a finding that Congress must have intended to convey the riverbed. Cf. *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918). But petitioners dispute this finding based on the

Indians' use of the river for fishing and agricultural purposes. See Pet. 9-16. On each point, there are arguably relevant differences that distinguish the present case from *Montana*. Essentially, the issues presented here are fact-bound, and their proper resolution depends upon the particular background of these Tribes and the language of the conveyance documents involved.

The case therefore does not appear to present any issue of sufficiently general importance to warrant a departure from the Court's customary practice of denying review at an interlocutory stage.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1983

DOJ-1983-10